IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

28/4/2016

CASE NUMBER: A658 / 14
NGHC CASE No CC215/01

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

22 APRIL 2016
DATE

SIGNATURE

Mavundla J

STEVEN MASWI SELOMA — **APPELLANT**

AND

THE STATE — **RESPONDENT**

JUDGMENT

MAVUNDLA J,

[1] The appellant together with two others were arraigned, charged, convicted and sentenced on the 3 August 2001 at the Local and Circuit Division for the Northern Circuit District held at Lydenburg before Spoelstra J on count 1 of murder and

sentenced to life imprisonment; on counts 2, robbery with aggravating circumstances as intended in s1 of Act 51 of 1977, and sentenced to 15 years imprisonment; count 3 assault on Ms Mawela and sentenced to 1 year imprisonment, count 4 unlawful possession of unlicensed firearm to wit Norinco NP20 Parabellum; on count 5 unlawful possession of ammunition, and for purposes of sentence counts 4 and 5 were taken as one and he was sentenced to 2 years imprisonment. He was further declared unfit to possess a firearm.

[2] The appellant now appeals against both the conviction and sentence with the leave having been granted by this Court on the 20 March 2013. Inasmuch as the saying goes that the wheels of justices grind slow but with certainty. It is unfortunate, however, that in the instance of the appellant, the wheels certainly were too slow, for various reasons, including the fact that the presiding officer who initially tried the matter retired. It is not clear from the record why the matter was delayed. This Court can do no more than to apologize to the appellant, in so far as there was any delay on its part in delivering this judgment.

[3] The appellant was duly legally represented at the trial. He pleaded not guilty to all the counts and exercised his right of silence. The appellant in his defence raised an *alibi* and also denied that he was found in possession of a firearm and ammunition.

[4] The appellant made admissions in terms of s220 of Act 51 of 1977 of the following facts: That the identity of the deceased was Hermanus Kitshoff; That Bhanwar Lal Bhootra conducted on 21 July 1999 the post mortem examination on the body of the deceased mentioned in the indictment; that the facts and findings recorded in the postmortem report are correct; that the cause of death as recorded in the post mortem report as "Gunshot Wound of Chest" is correct; That the post mortem report is handed in by agreement; that the photo album of the scene and the deceased are handed in by agreement as exhibit C. It does not appear from the record that the correctness of other exhibits was admitted in terms of s220. In this regard I refer in particular to the findings and results of the DNA blood sample and the blood stains on the R20. 00 note which were not admitted.

[5] The conviction of the appellant is primarily premised on the DNA results on the test conducted on the blood sample on a R20. 00 note found on the appellant, to match the blood sample of the deceased[1], as well as the ballistic test results conducted on the spent 9mm cartridge and a projectile found at the scene and firearm which was found on the appellant[2]. I will in due course revert to these exhibits (D and N). The issue to be determined is whether the State had proven its case against the appellant beyond reasonable doubt.

[1] Exhibit D page 150:" 5.1 The DNA-STR profile of the genetic material from the twenty rand note (B) (Par 3.2) matches the DNA-STR profile of the control blood sample 9Lyk 229/99) (par 3.1)".
[2] Exhibit N at pages 163 -166.

[6] The State called the following witnesses: sergeant Makhurana; Mrs Rebiditswe Mawela; Mrs MH Kltshoff; Mr Bennet Letsepe Mogoru; inspector Phineas Mohale who was a sergeant at the time of the incident in issue; Inspector Thobela Mogadime; inspector Frans Matsheke; Mr Mathekgane Seanego who is a member of the SAPS attached to the Local Criminal Record Center Lebowakhomo.

[7] The appellant testified in his own defence and did not call any witness. For whatever it is worth it may be mentioned that the appellant was accused 1 in the court *a quo*. He was charged together with accused 2 and accused 3. However, the appeal of the other two co-accused is not before us and as a result not much would be said about them save where it is relevant.

[8] It is common cause that on the 19 July 1999 Mrs. Rebiditswe Mawela, the complainant in count 3, was offered a lift by the deceased, who was travelling in his light delivery vehicle with a trailer on it. She was seated in front with the deceased driving. When they reached Makgane village the deceased stopped to sell eggs and milk to some people. Suddenly Mawela's passenger door was wrenched open and she was thrown out of the vehicle. She rolled and crawled for a distance of about 12 to 15 meters and stood up and ran to the nearest house. She also heard two gun shots but did not see who fired these shots.

[9] The evidence of Mrs. Hendrika Kisthoff, the wife of the deceased is not disputed. According to her evidence the deceased left on the morning of 19 July 1999 in his light delivery vehicle to go sell milk, chicken and eggs. He usually left having an amount of about R2000. 00. The deceased did not return home and she reported this to the police, who subsequently informed her that he was shot and killed. She subsequently identified a golden Citizen Wrist watch as that of the deceased.

[10] It is not in dispute that Sergeant Nathaniel Matubane Makhurana, attended the scene of crime and found the deceased slumped in the front driver's seat with a bullet wound on his chest. He also found a spent 9 mm cartridge about six meters from the motor vehicle. He also found a projectile on the floor inside the vehicle. He also found the deceased's identity document inside the vehicle which revealed the deceased as Kitshoff from Dullstroom. He alerted some of the members of the police force who, *inter alia,* sergeant Seanego came to the scene. Although he showed the projectile and the cartridge to Seanego he does not know who picked these up. He also does not know who took the photos at the scene of crime.

[11] It is common cause that inspector Mogoru on the 20 July 1999 stopped a maroon Venture travelling from Steelpoort to Sekhukhune. The appellant and his co-accused 2 were also travelling in this maroon vehicle. Mogoru, arrested the appellant and his co-accused 2. The accepted version of Mogoru was that he found an unlicensed Norinco 9mm firearm tucked on the appellant's hip. The appellant ran away but

with the assistance of some of his colleagues they managed to pursue and apprehend him. The appellant informed him that he was holding the firearm on behalf of a friend who he pointed out to him. It is common cause that the said friend was the co- accused 2. Mogoru went to search this person pointed out by the appellant and found a schoolbag on him, which contained a skipper with black stripes and tekkies called Hi-Tech which tekkies had drops of blood on them. He also found on the appellant money which had blood stains but gave it back to him. He disputed the version of the appellant put to him that the firearm was not found on him but only heard mention being made that a firearm was found in the vehicle. He further said that he arrested the appellant for possession of the firearm and Mr Mabuza (appellant's co-accused 2) on the basis of what was said by the appellant. In his written statement Mogoru said that he arrested Mabuza for the fact that he had tekkies which had blood.

[12] Sergeant Phineas Thosago Mohale was on duty at Sekhukhune police station on the 20 July 1999. Sergeant Mogoru and his colleague brought the appellant and accused 2 to the police station for being in possession of a firearm. Just before placing the appellant into the cells, he found on him some money of which a R20. 00 note had blood stains on it. He wrote in the SAP 13 of this blood stained note and informed the investigating office thereof. Both the appellant and accused 2 did not have any blood stains on them.

[13] Seargent Thobela Thobias Mogadime arrested accused 2 at his home after his room was pointed out by his mother. In his room he found in the wardrobe a brown jacket inside which he found money: R200. 00, R5.00 coin and 20 X R2. 00 coins totaling R40. 00, a golden Citizen watch, number 659983. On searching further accused 2's room he found a .38 special revolver; one lethal round of a as well as two empty cartridges in the chamber of that firearm. He confiscated all the items found on accused 2 and registered them in the SAP 13 register.

[14] Inspector Frans Matsheke testified, *inter alia*, that he spoke with sergeant Rauphala to arrange with a doctor to extract from the deceased a blood sample. He later received from inspector Rauphala of the government mortuary the blood sample already sealed which he sent together with the R20 note to the forensic laboratory.[3] He also received the blood samples of the deceased. He also booked out the R20 note from SAP 13 and forwarded those exhibits to the Forensic Science Laboratory and the results were positive. He also forwarded the firearm to the ballistic unit through inspector Seanego.[4]

[15] Inspector Mathekgane Seanego is a member of the SAPS attached to the Local Criminal Record Centre 'Lebowakgomo. On the 19 July 1999 he attended the scene of crime where he found Sergeant Makhurana who pointed the scene to him. He took photos of the scene, also uplifted exhibits on the scene, and amongst them was

[3] Paginated page 53 lines 6-12; pagainated pag 54
[4] NB projectile and cartridge were inserted in plastic containers marked exhibit a and b page 67.

a fired cartridge case and a projectile. He put these in separate plastic containers, marked exhibit A and B respectively. On the 22 July 1999 he received a Norinco pistol with its numbers (filed) off and a damaged revolver with three cartridges inside, from sergeant Matsheke. The pistol and the revolver were packed in transparent plastic bags, marked Exhibit E and D respectively. All the exhibits were packed in one parcel and sealed with seal stamp number 10 and forwarded to Forensic Laboratory, Ballistic Unit for further investigation.[5]

APPELLANT'S CASE

[16] It is common cause that the appellant was caught after he tried to run away. He denied that a firearm was found in his possession. His explanation for running away was that he was informed that he was suspected of robbery. He said that during 1998 police officers accused him of having pointed someone with a firearm. He conceded that he had an amount of R270 at the time of his arrest. He said that he had; *inter alia*, R50 note and two R10. 00 notes. He denied involvement in the commission of the crime and said that he was at his grandmother's place. He did not call any witness and closed his case. Needless to state that his version was rejected by the trial court and that of the State was accepted, thus his conviction as charged.

[17] On appeal the conviction of the appellant was assailed on the ground that there was a broken chain in respect of the extraction, of the blood sample of the deceased and

[5] Paginated p68 line25-p67 lines 1-25.

remittance thereof for analysis. Equally so too there was also a broken chain in respect of the collection of the cartridge and the projectile, and the remittance thereof to the laboratory for analysis. It was submitted that bearing in mind that the appellant had raised a defence of *an alibi*, the State has not succeeded in refuting the unreasonableness of the version of the appellant and therefore failed to prove beyond reasonable doubt the guilt of the appellant.

[18] It is trite that in a criminal trial the state bears the *onus* to prove its case beyond reasonable doubt. In *S v Chabalala* 2003(1)SACR 134 AT 139 i-140b it was held that the correct approach in criminal trials is to weigh up all the elements which point towards the guilt of the accused against all those that are indicative of his innocence, taking proper account of inherent strength and weaknesses, probabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any doubt about the accused's guilt.

[19] *In casu* the appellant raised an *alibi*. In the matter of *S v Khumalo* 1991 (4) SA 310 AD at 327 G-H the Appellate Court held that where the accused has raised the defence of an *alibi*, the *onus* rest on the State to negate the alibi. If there exist a possibility that the *alibi* might be reasonably possibly true then the State has not acquitted itself of its *onus*; Vide (*R v Biya* 1952 (4) SA 514 (A) at 521D-E). The correct approach in this regard is to consider the *alibi* on the basis of the totality of the

evidence relating thereto, and the Court's impression of the witnesses; vide *(Rv Hlongwane* 1959 (3) SA 337 (A) at 341 A.

[20] It is common cause that Matsheke requested sergeant Rauphala to arrange with the doctor at the mortuary to extract blood from the deceased. Matsheke received the blood sample which had already been sealed from sergeant Rauphala. Matheke was personally not present when the blood was extracted; vide page 54 line 9- 15. He was also unable to assist the court with regard to the seal number on the blood sample holder; page 55 lines 1-10. His evidence that it was the blood sample of the deceased is therefore hearsay evidence, more so because Rauphala was not called to testify. There was also no s212 affidavit of the person who extracted the blood sample from the deceased. I am of the view that the chain in respect of the blood sample upon which the State relied was not intact, but broken.

[21] In the matter of *S v Van Der Westhuizen* 1989 (1) SA 468 (TPD) at 473 the Court held that the State tried to prove its case beyond reasonable doubt by means of *prima facie* evidence, about the blood sample which was extracted from the accused. Where the statutory provisions had not been complied with due to the break of the chain in regard to the certificate, it cannot be said that the state had proven its case beyond reasonable doubt.

[22] The version of the appellant was that he was on the day in question at his home. After his arrest and that of his erstwhile accused 2, both their respective homes were

searched. Nothing was found at the appellant's place. On the other hand, the deceased's watch was found at accused 2's place. The appellant said that he was holding the firearm from which the spent cartridge and the projectile were fired from on behalf of accused 2. Taking these facts into consideration, I am of the view that the State has failed to negate the *alibi* of the appellant. Even if the court does not believe the version of the appellant, if it is reasonably possibly true, then the Court must give him the benefit of doubt. In regard to the offences that were committed on the 19 July 1999, I am of the view that the court *a quo* erred in finding the appellant guilty on those charges but should have acquitted him on those charges. I am therefore of the view that the appeal in respect of the charges of the 19th July 1999 should succeed. Needless to say, the appeal on sentences in respect of these charges must also succeed.

[23] In respect of the possession of the firearm and the ammunition the appellant was on his own admission in possession of these. It is immaterial that he held the firearm on account of his friend. He made himself guilty on those charges because he had no license to hold such firearms which the relevant ammunition could have been fired from. In respect of these charges he was quite correctly found guilty and therefore the appeal on these charges should fail.

[24] In respect count 4, unlawful possession of unlicensed firearm, to wit Norinco NP20 Parabellum, and count 5, unlawful possession of ammunition, and for purposes of

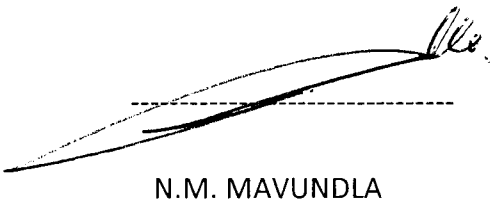
sentence these counts were taken as one and he was sentenced to 2 years imprisonment. He was further declared unfit to possess a firearm. I am of the view that nothing justifies that this court should intervene in respect of the sentence imposed for these charges and the sentence of 2 years is accordingly confirmed. Needless to state that the effect of life imprisonment sentence is that the other imprisonment sentences run concurrently with such life imprisonment sentence. The appellant has been in prison for a considerable period and has therefore effectively served more than the two years imprisonment for counts 4 and 5 and should therefore be immediately released.

[25] In the result the following order is made:

1. That the appeal on conviction and sentence in respect of all the charges, save in respect of both count 4 and 5, is upheld and both conviction and sentences are set aside.

2. That the appeal on both conviction and sentence in respect of counts 4 and 5 is dismissed and the conviction and sentence is confirmed.

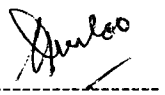
[3] That the sentence in respect of counts 4 and 5 is ante-dated to the 3rd August 2001.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

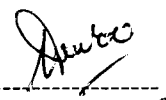
I agree and it is so ordered.



W.R.C PRINSLOO

JUDGE OF THE HIGH COURT

I agree and it is so ordered



PRINSLOO J

K.E MATOJANE

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : / 04 / 2016

APPELLANT`S ATT : PRETORIA JUSTICE CENTRE

APPELLANT`S ADV : ADV M. B. KGAGARA

RESPONDENT'S ATT : DIRECTOR OF PUBLIC PROSECUTION

RESPONDENT'S ADV : ADV E. V. SIHLANGU