IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: A279/2018

In the matter between:

MZUKISI MATANZIMA	First Appellant
MAKAWANDE MHLAWULI	Second Appellant
and	
THE STATE	Respondent

JUDGMENT: 08 February 2019

DAVIS J

Introduction

[1] The two appellants before this Court were charged together with three others on a count of murder, a count of attempted murder, two counts of possession of unlicensed firearms and ammunition. While their co-accused were acquitted, the two appellants were convicted on a count of murder for which they were sentenced to a term of imprisonment of 20 years, a count of possession of an unlicensed firearm for which they were both sentenced to a term of imprisonment of five years and a count of possession of ammunition for which they were both sentenced to a term of imprisonment for three years, the court ordering that all these sentences were to run concurrently. As a result of a successful petition to the Supreme Court of Appeal, this appeal comes before this Court.

The facts

[2] Briefly the facts leading to the conviction of the two appellants can be summarised thus. On the evening of 16 January 2010 while his motorcar was parked outside number T17 Site B Khayelitsha, the deceased and a friend, Malwande Gwada were attacked by a group of between four to five males, some of whom were armed with firearms. The deceased died of multiple gunshot wounds while Mr Gwada sustained a grazed wound to the forehead. Their cell phones and car keys were stolen. Mr Gwada could not identify the attackers, because 'I lost my senses for a short while'. The assailants escaped, after having killed the deceased and having shot Mr Gwada in the forehead. Unfortunately Mr Gwada's evidence was vague and the incoherent record makes it even more difficult to follow.

[3] Ballistic evidence provided by warrant officer Brummer, which was admitted into evidence in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the Act), confirmed that the two bullets which had been fired and killed the deceased were not fired from the same firearm.

[4] The first appellant was convicted by the court *a quo* on the basis of two statements, that he had given to the police, the second of which was central to the court *a quo's* finding. In his first statement, the first appellant confirmed that the deceased had been murdered and that two people had done the shooting, one of which was the second appellant. According to this statement, second appellant had fired three shots while the deceased lay next to his motor vehicle.

[5] The first appellant then provided the police with a second statement on 25 February 2010 which he gave to Captain Paul Hendrickse. In this statement he said the following:

'I have already made statement in this case. However when I made the statement I mentioned that I did not shoot. I feel bad that I told lies and now want to tell you the truth.

On the night of the incident I was armed, with a Star Pistol which was given to me by "Gabbie", Gabbie was armed with a 7.65 pistol that "George" organised for him. I did fire one shot from the passenger side. "Gabbie" fired one shot from the front (windscreen) he then opened the door and fired two more shots.

This is all I want to tell you Sir.

I have also now been warned by Captain Hendrikse before I sign this statement that this statement can be used against me in a trial.'

[6] As indicated these statements were central to the reasoning of the court *a quo* in convicting the first appellant:

'On his own admission Mzukisi has admitted committing offences, namely in possession of a firearm and shooting at the deceased. There is no indication that this was a lawful firearm and ammunition. According to the post mortem report the deceased died of multiple gunshot wounds.

We ask ourselves the following questions. If Mzukisi was told by the police what to write in his statements what did the police tell him to write. Why the information in his statements in detail. Where did the police get such information from. If he knew Colonel Ngubelanga and when Ngubelanga wrote his statement on his behalf where did he get such detailed information from. If he told the police lies what is the truth. Surely there was a duty on his part to explain his innocence to this Court. He decided to let that opportunity to pass.'

First Appellant's case on appeal

[7] Appellant's counsel submitted that the court *a quo* had erred by refusing to give a ruling on the outcome of the trial – within – a trial which had taken place in

order to determine whether, in terms of s 219 A of the Act, the statements made by first appellant had been voluntarily made so that the contents thereof were admissible against him. In submitting that no ruling had been issued by the court *a quo*, appellant's counsel referred to the following passage of an exchange between counsel for the State and the court. Counsel for the State said:

> 'We just merely request or seek the permanent ruling on these aspects before the State can close its case however we are dependent on the finding so the ruling by the Court M'Lord, that is my own submissions M'Lord.'

The court responded thus:

> 'It is really indeed the duty of this Court to hear the whole evidence not on a piecemeal but to hear the evidence holistically. It is not the duty of this Court to assist anyone of you in doing your duties. It is not for this Court to assist any of you in a piecemeal way but however it is the duty of the Court to listen to the evidence holistically and at the end of the day to make a decision. At this stage the evidence before this Court is not holistically and therefore having heard your submissions and having read the documents filed herewith, this Court is making no ruling, the status *quo* under remains you must continue.'

[8] On this basis, it was contended by first appellant's counsel that no ruling had been given by the court *a quo*, thereby rendering invalid the admissibility of first appellant's statements *a quo*. As Schwikkard and Van der Merwe Principles of Evidence (3rd edition) at 259 write:

> 'A trial within a trial should as a rule be held where the defence object to the admissibility of evidence on the basis of s 35(5). The reason for this procedure is to ensure that an accused can testify on the issue concerning the admissibility of the impugned evidence without exposing himself to cross-examination on guilt and an accused is – for purposes of exercising his right to testify or not at the end of the

state's case in the main trial – entitled to know what evidence has been admitted as part of the state's case against him.'

[9] The necessity for a ruling by the trial court after a trial – within – a trial was canvassed in *S v Ndhlovu* and others 2002 (2) SACR 325 (SCA) where Cameron JA (as he then was) wrote at para 19:

'Unless the State obtains a ruling on the admissibility of the hearsay evidence before closing its case, so that the accused knows what the State case is, he or she cannot thereafter be criticised on the basis of the hearsay averments for failing to testify. It also suggests, rightly, that unless the court rules the hearsay admissible before the State closes its case, fairness to the accused may dictate that the evidence not be received at all.'

[10] In analysing the relevant law, Cameron JA dealt with the implications of the earlier decision in *S v Ramavhale* 1996 (1) SACR 639 (A) at 651 where Schutz JA had noted that:

'The frequent practice of admitting evidence provisionally, though appropriate to some situations, often works most unfortunately. Instead of forcing practitioners to prove relevant facts by admissible evidence it may allow them to range around vaguely, which is not good for the administration of justice or for anybody, except perhaps the beneficiaries of costs unnecessarily incurred. In any event, I doubt that this evidence was admitted, even provisionally. It was just there; in the words of State counsel 'unfortunately the evidence did slip out of defendant's mouth'. But even if it was provisionally admitted, another adverse consequence of the practice is exposed – who knows what's in and what's out? This may lead, in a criminal case, to the defence counsel being placed in an unnecessarily difficult position when deciding whether to put his client in the box.'

[11] On the face of this dictum by Schutz JA in *Ramavhale, supra,* it would appear that the practice of provisionally admitting a statement was not legally permissible. However in *Ndhlovu, supra* at para 20 Cameron JA carefully analysed the implications of this *dictum.* The learned judge of appeal noted that the court *a quo* in *Ndhlovu* had informed counsel that the ruling 'was reviewable at the end of the case' and that his mind 'will not close after this ruling'. In short, Cameron JA held that this 'ruling was clear and unequivocal, albeit subject to re-assessment at the end of the case.' (para 20) It was thus held that the court *a quo* had not erred when it ruled that a statement was admissible but could be subject to reassessment at the end of the entire proceedings.

[12] In the present case, the exchange between the court *a quo* and counsel for the State, to which I have made reference, was preceded by a detailed ruling at the end of the trial – within – a trial. In its ruling the court *a quo* noted that the first statement given by the first appellant was taken by Colonel Ngubulanga. The colonel knew the first appellant well and communicated with him in Xhosa. The first appellant conceded that he knew the colonel yet never raised any police assault or threat thereof. The court *a quo* found as follows:

> 'Accused one conceded that he knew Colonel Ngubulanga very well, and he did not tell the magistrate and the police seniors, his family, only later about the assaults and threats. However, accused one was very honest when he was asked about why his did not tell the magistrate he said it never came to his mind.'

The court *a quo* continued:

> 'Colonel Ngubulanga has described the atmosphere that they were conversing in isiXhosa and they even talked about something that was even outside the confession or the statement, indicating then that he was in a relaxed mood. Why he

did not tell him. His reasons for not telling Colonel Ngubulanga are flimsy and not acceptable. Why then the accused did not tell senior police officer. These are the questions that we are asking. Senor officer of the police, senior police officer, about the threats. One would understand then by saying if then the reasoning of the accused is that they were anyway police people so he saw he could not be safe in the hands of other policemen. That could be acceptable but what about then the magistrate, who is supposed to then they should be comfortable with him, and the accused was very honest again, he is saying it never came into my mind. Why then not telling the attorney. Miss Magona, for example, in her submissions has stated quite clearly and we accept that, that they could trust their families and their attorney. There had been no suggestion that Captain Hendrickse had assaulted him; only that he threatened to return him to the other police officers.'

[13] After analysing this evidence the court held:

'I am satisfied that the State has proved its case beyond a reasonable doubt that the documents of statements made by accused 1, 2, 3 and 4 were made freely and voluntarily whilst in their sound a sober senses and without having been unduly influenced thereto. In the result the confession statements by accused 1, 2, 3 and 4 hereby provisionally admitted.'

[14] This finding, following upon a detailed examination of the background preceding the two statements by first appellant must be read together with the passage to which I have made reference earlier and which was relied upon by counsel for first appellant. Read together, what transpired and the proceedings before the court *a quo* is precisely the situation envisaged by Cameron JA in *Ndhlovu,* namely that the two statements were admitted, subject to a possible reassessment at the end of the trial. It may well have been that at the end of the trial the court would have been compelled to reassess the statements in the light of

further evidence. But the statements were admitted after the ruling and the first appellant clearly knew this decision now required a response.

[15] The appellant elected not to testify. That itself has consequences. See for example *S v Monyane* 2008 (1) SACR 542 (SCA) at para 19. But what is clear from the ruling subsequent to the trial – within – a trial, is that the appellant was placed on his defence, in that it was clear that the evidence which had been given in terms of the statements was admissible and therefore could have been employed, subject to possible reassessment at the end of the defence's case.

[16] Appellant's counsel did not press the question as to whether the ruling itself was incorrect. This was a wise cause of action in that nowhere in his evidence in the trial – within – a trial did the first appellant suggest that Captain Hendrickse had assaulted him or threatened him, save for a vague averment that Hendrickse had suggested that if the first appellant did not provide a second statement, he would return the appellant to the previous investigating team whom the appellant had suggested had assaulted him.

[17] On its own, this vague averment is hardly sufficient to suggest that the statement was not voluntarily made. In addition, the examination of the evidence of Captain Hendrickse reveals that, absent a video recording of the interview which is regrettable, there was no compulsion employed. That first appellant was confronted with a different version given by one of the co-accused hardly falls can be said to be a ground of inadmissibility. Hence the statement had been voluntarily made and thus fell within the parameters of the applicable law.

[18] The statements made by first appellant coupled with the uncontested evidence namely that two shooters had inflicted the fatal wounds on the deceased

on the night in question revealed that the first appellant had described the murder as having been conducted by himself and the second appellant, who featured prominently in the statements of first appellant. In itself this was congruent with the evidence that two shooters were involved in the murder.

[19] This brings me to the question of appellant two.

Second Appellant's case

[20] Appellant two's palm print had been found on the bonnet of the deceased motor vehicle. It was not placed in dispute that the palm print was that of the second appellant. In addition, important evidence was provided by Ms Helen du Plessis from the MTN Network. She had examined relevant cell phone records, including all incoming and outgoing SMS's sent/received as well as the date and time that they were made and the towers from which the calls were made and received. She did this investigation, after having been provided with several cell phone numbers by the investigating officer. She testified that, from these cell phone records and the numbers provided to her, it was clear that the second appellant together, with two other accused (who had been acquitted for other reasons) phoned each other before the commission of the crimes committed on 16 January 2010. The calls had been made from the same area or towers where the crime scene was located. Furthermore, the cell phone of the deceased was used to make calls to the second appellant and accused three (in terms of the initial trial) after the murder had been committed.

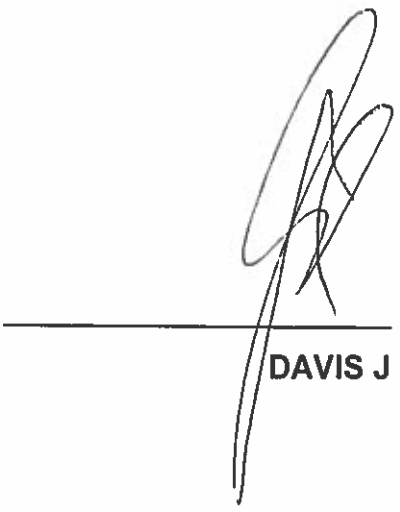
[21] Appellant's counsel put forward a series of hypothetical propositions in an attempt to explain away the existence of the palm print. In short, given that the

events in question occurred in Khayelitsha, the argument was that there was a possibility that, inadvertently the second appellant had placed his hand on the bonnet of the vehicle on a previous occasion, notwithstanding that on the day of the incident it was uncontested that the deceased car had been washed before the crimes had been committed.

[22] In the light of the uncontested evidence with regard to the cell phone records, the inference which second appellant's counsel sought to draw in respect of the existence of the palm print cannot be considered to be reasonable nor remotely plausible. It should be emphasised that the second appellant elected not to testify. One would have expected that, if there was a plausible explanation in respect of either the cell phone calls or the palm print which was consistent with second appellant's innocence, he would have testified to that effect.

[23] In my view, given the circumstances of the case as I have outlined it, there was sufficient evidence to establish guilt beyond a reasonable doubt in the cases of both appellants. The application for leave to appeal was only against the conviction not against the sentences imposed.

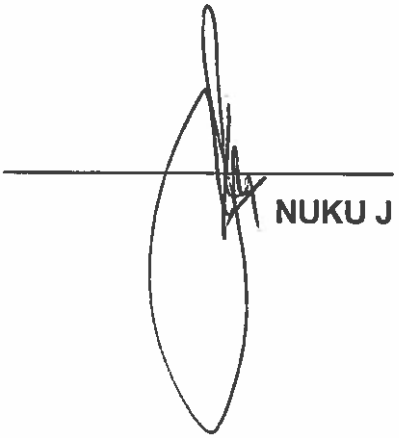
[24] For all of these reasons, the appeal is dismissed. The convictions on all three counts in respect of both appellants one and two together with the sentences imposed by the court *a quo* are hereby confirmed.



DAVIS J

STEYN J

I agree



NUKU J

I agree.