IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R228/2011
DATE HEARD: 13/12/2017
DATE DELIVERED: 23/01/2018

REPORTABLE

In the matter between

MZUKISI ERNEST WITBOOI	**1ST APPELLANT**
MABHUTI MITHIYO	**2ND APPELLANT**
ERIC LOLWANA	**3RD APPELLANT**

and

THE STATE	**RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The three appellants were convicted in the Regional Court of two counts of attempted murder and one count of robbery with aggravating circumstances. The first appellant was further convicted of unlawful possession of a firearm, and the second appellant was further convicted of unlawful possession of a firearm and unlawful possession of ammunition. They were all acquitted on a charge of indecent assault. They were each sentenced to 15 years' imprisonment on each attempted murder count, and twenty years' imprisonment for robbery with aggravating circumstances. The first appellant was sentenced to three years' imprisonment for possession of a

firearm, which sentence was ordered to run concurrently with the sentence imposed for robbery. The second appellant was sentenced to three years' imprisonment for possession of a firearm and possession of ammunition, the counts having been taken as one for the purpose of sentence. This sentence was to run concurrently with the sentence imposed for robbery. The result was that each appellant was sentenced to an effective term of 50 years' imprisonment. This appeal, with the leave of the trial court, lies against the convictions and sentences.

[2] It was not in dispute that on 30 December 2006 Mrs Wilma Rigby and her husband Mr John Rigby, both in their seventies, were brutally and mercilessly attacked by three men in their home on Southbourne Farm, Addo, and robbed of some of their possessions. Following the attack, both of them spent ten days in hospital, in the intensive care and high care units.

[3] Amongst the stolen property were two firearms, one of which, a rifle, was allegedly found in the possession of the first appellant on 14 January 2007, and the other, a revolver, loaded with ammunition, was admittedly in the possession of the second appellant on 17 January 2007. A further item was a unique briefcase which it was common cause was on 15 January 2007 in the possession of the second appellant. This briefcase was given to Mr Rigby while in Australia and there are only three of its kind in South Africa. This briefcase contained a number of remote controls which the Rigbys could not identify. Also among the stolen property was a tin of pepper/defence spray. It was not in dispute that a tin of pepper spray was in a bag which was in the possession of the second appellant on 15 January 2007. A white

Isuzu bakkie with blue stripes and with a low mileage was stolen and not recovered. This bakkie played a part in the conviction of the first appellant.

[4] Mr and Mrs Rigby were unable to identify their attackers, who wore balaclavas. The first and second appellants were convicted on the basis of circumstantial evidence, and the third appellant was convicted on the basis of a pointing out, during which he made a statement amounting to a confession.

[5] This appeal has taken many years to be heard. The appellants were sentenced on 30 November 2009 and leave to appeal was granted on 2 December 2009. Even before judgment, it was not possible for portions of the evidence to be transcribed and certain witnesses whose evidence had not been transcribed were recalled. The record presently is incomplete, despite sterling efforts on the part of Ms van Heerden of the office of the Director of Public Prosecutions. It appears from her affidavit that although the record was received by the Registrar during 2011, she only became aware of the appeal during 2015. The appeal served before this court during 2015, and an order was made for the reconstruction of the record. Ongoing efforts by Ms van Heerden were made to achieve a full record, reconstructed or otherwise, to no avail. It is clear from correspondence annexed to Ms van Heerden's affidavit that she exhausted every possible source in attempting to provide a complete record. She was in contact with all the relevant role players. The appeal was eventually heard on 13 December 2017.

[6] A portion of Mr Rigby's evidence was not transcribed. However this did not prejudice the appellants. Mrs Rigby's evidence fully covered the events which took place in their house and that portion of Mr Rigby's evidence which was transcribed

covered events which appear to have occurred soon after the robbers entered their home.

[7] I shall deal with the further missing parts of the record during the course of this judgment.

[8] In addition to the evidence of the Rigbys, the following evidence was adduced by the State.

[9] Mr Khayalethu Tapi testified that between the end of December 2006 and the beginning of January 2007 his friend, Mr Thembelethu Majalu, arrived at his home with the first appellant. Majalu told him that the first appellant wanted to take a bakkie to Motherwell. The three of them proceeded to a spot where the first appellant alighted and returned with an Isuzu bakkie which was white with a blue stripe and a grey stripe, and seemed to be new. Tapi drove with the first appellant in the bakkie and on the way to Motherwell the first appellant told him that he had stolen the bakkie "daar by Kirkwood se plase". When they arrived in Motherwell the first appellant handed over the bakkie to some men at a garage. Tapi was unable to dispute during cross-examination that this event took place on 28 December 2006. During cross-examination he was confronted with his police statement in which he had said, *inter alia*, that the first appellant "told me the bakkie was stolen by a farm". He said that the person who wrote down his statement had done so incorrectly.

[10] Majalu testified but was discredited and his evidence was completely disregarded.

[11] On 20 November 2009 Captain Ashley Martin was recalled to testify. This was after the appellants had testified. His original evidence was not transcribed or reconstructed. He testified that on 14 January 2007 he and other members, including Inspector Oosthuizen, had received information concerning a suspect with a .303 rifle. They proceeded to a shebeen in Alwyntjies, Addo, a residential area. They had been informed of the clothes that the suspect was wearing and that he was sitting in front of the shebeen. They found the suspect, whose clothes matched the description given to them. It was the first appellant. Martin asked him to accompany him to his residence because they had information that he was in possession of a firearm. Martin did not know where the first appellant resided. The first appellant took them to a shack which was locked with a chain and padlock. The first appellant unlocked the padlock with a key which he had in his possession. Martin assumed this was where he lived. Inspector Oosthuizen found the firearm between a window and a plank. When shown the firearm, the first appellant immediately said that he had no knowledge of it and did not know whose it was. He was taken to the police station where he was arrested by Inspector Oosthuizen.

[12] During cross-examination by the first appellant's legal representative, who had his notes of Martin's original evidence, some minor inconsistencies with his original evidence were pointed out. According to the notes the first appellant had said he did not know what they were talking about but that he would accompany them and point out his house. Martin agreed this was correct. He also agreed that the first appellant could have pointed out any house to them, because they did not know where he lived. He agreed that the shack appeared more as a place to sleep because the only

furnishing was two beds. He could not dispute that other persons also had keys to the shack and that the first appellant's residence where he lived with his wife and children was elsewhere, namely B23 Alwynshoogte. This was the address of the first appellant on the charge sheet. Martin did not go to that address.

[13] The magistrate asked Martin if it had been put to him when he previously testified that he had been to another house belonging to the first appellant. Martin said that this had not been put to him and that they had only been to one house to which the first appellant had taken them. The magistrate explained to Martin that they were rectifying the record and that the first appellant had testified that they had been to another house. Martin said that they had definitely not been to B23 Alwynshoogte.

[14] Inspector Oosthuizen did testify originally but her evidence was not recorded or reconstructed. She could not be recalled because she died during 2008. Her written statement made on 14 January 2007 was admitted by agreement. The relevant portions read as follows:

> "On 2007.01.14 at approximately 16:50 I was busy following up information about a suspect in the Addo area. We first went to a shack in Valencia Addo to look for the guy, but did not find him there.
>
> Supt Mqokoma who was giving us the information, told the members to put a black guy who was at the shack in the police vehicle. According to the Supt. he had information there might be a 303 rifle in the shack the man stayed.
>
> The man dressed in a light blue jacket and blue jeans took us to the shack in Aalwyntjies, Valencia where he stayed. I together with Capt. Martin from National Intervention Unit entered the shack. I searched the shack while the owner watched. I then lifted up the curtain which was hanging in front of a window.
>
> Upon lifting the curtain I immediately saw the rifle which was placed on a wooden frame of the shack. I then informed Capt. Martin as well as the suspect about the .303 rifle.
>
> I then confiscated the rifle and brought the suspect who identified himself as Mzikay Witbooi to the Addo police station,"

[15] The record reflects that there was some discussion between the magistrate and the first appellant's legal representative, who accepted that the statement was consistent with her evidence. He mentioned some aspects of the cross-examination of Oosthuizen: that she was surprised at the first appellant's co-operation; that the shack was only a place to sleep, not a residence; that the shack was not locked; and that the firearm was not well hidden ("nie erg weggesteek nie").

[16] The prosecutor pointed out to the court that there was a contradiction between Martin and Oosthuizen concerning whether or not the shack was locked. He also referred to Oosthuizen's evidence that they did not know where the first appellant lived and that he had shown them where he lived.

[17] Mrs Eunice Speelman is the aunt of the second appellant. She testified that at about 4 am on 15 January 2007 the second appellant arrived looking for a place to sleep. He had with him a briefcase and a red bag which he left behind when he departed. The red bag contained dirty clothes which he said he was taking to his mother to be washed. The briefcase contained medicines and a woman's shoe. The police visited Mrs Speelman at a later stage.

[18] Constable Gregory de Bruin testified that on 17 January 2007 he received certain information following which he and his colleague found the second appellant in a street in Addo. They stopped next to him and de Bruin alighted from the police vehicle in order to arrest him. The second appellant ran and failed to stop when

ordered to do so. De Bruin gave chase and fired a warning shot. The second appellant continued to run and was eventually found hiding in a garage and arrested. A firearm was found in a drum. Cross-examination of de Bruin by the first appellant's legal representative had just commenced when the recording of his evidence stopped and he was recalled at a later stage, after the appellants had testified, for cross-examination to be repeated. The second appellant's legal representative reminded de Bruin that he had previously put to him the version of the second appellant, namely that on the day he was arrested he was actually on his way to throw the firearm into a dam. He had found the firearm in a bag during January. De Bruin agreed that there was a dam in the vicinity.

[19] Inspector Deon Botha was the investigating officer in the case. He testified that he visited the crime scene on 30 December 2006. No fingerprints or other forensic evidence were detected. The first breakthrough in the investigation was the discovery of the stolen rifle whereafter the first appellant was arrested by Inspector Oosthuizen and Captain Martin. The second appellant was arrested in connection with the stolen revolver. Inspector Botha visited the house of Mrs Speelman on 18 January 2007 where he found the stolen briefcase. A bag containing remote controls was in the briefcase, and clothing and a tin of pepper/defence spray were in the red bag. Botha arrested the third appellant after receiving information that he was involved in the robbery.

[20] The cross-examination of Botha was only partly recorded and the only record of the rest of his cross-examination was the prosecutor's notes, which were annexed to Ms van Heerden's affidavit. There is no indication that the magistrate or legal representatives were in agreement with these notes. They record, *inter alia*, that when

Botha was cross-examined by the second appellant's legal representative, he said that the items left with Mrs Speelman by the second appellant were not hidden away, and that the complainants could not identify the remote controls as their property. It was also put to him that the second appellant would say that he had found something (the word was illegible) as well as the remotes alongside the railway line which leads to Addo. The notes also record that Botha confirmed that other than information from the first appellant, there was nothing linking the third appellant to the crimes.

[21] Botha took warning statements from all three appellants. A trial within a trial was held to determine the admissibility of the warning statements of the first and third appellants. These statements were held to be admissible. In his statement the first appellant said "Ek verstaan alles en wil gaan wys wat ek gedoen het". In his statement, taken on 8 February 2007, the third appellant said "Ek verstaan die klagtes teen my en wil gaan uitwys wat ek weet van die voorval". Botha's evidence in the trial within a trial was neither transcribed nor reconstructed. Reservist Sergeant Nono testified that he was the interpreter when the statement of the third appellant was taken. He said that he was satisfied with the statement and that he read it back to the third appellant, who was satisfied and who signed it. Nono had no knowledge of an assault by Botha on the third appellant prior to the taking of the statement. The name of the person who read the statement back to the third appellant was left blank in the statement. Nono said that it was Botha's duty to insert the name because he was the person who had filled in the form. It was put to Nono that the third appellant would say that he had not given the statement voluntarily and that it had been said to him that if he did not co-operate he would be assaulted further.

[22] Sergeant Cecil January testified that he was not present when the third appellant's statement was taken. He denied that he had assaulted the third appellant or that any other person had assaulted the third appellant in his presence.

[23] The first and third appellants did not testify in this trial within a trial.

[24] In his judgment finding the statements admissible, the magistrate said that it was alleged that the first appellant had injuries (presumably this was during the cross-examination of Botha). He said that he could not deny this and that it was probably correct, but that it would be irresponsible of him to accept that the injuries were inflicted when the first appellant was questioned about the case. He said further that it would be irresponsible of him to reject the evidence of Botha. The evidence of the three witnesses indicated to the magistrate that no irregularity occurred in the taking of the statements.

[25] A second trial within a trial was held with regard to pointings out by the first and third appellants. That of the first appellant was found to be inadmissible but that of the third appellant was found to be admissible.

[26] The contents of the documents recording the pointing out proceedings, which included the explanation of rights, were admitted by the first and third appellants and no further evidence was led by the State in this trial within a trial.

[27] Not much need be said with regard to the pointing out by the first appellant. The magistrate in his judgment referred to allegations by the first appellant that he was

assaulted by the police members who had arrested him, and further that in the pointing out document, in answer to the question whether he had been assaulted, threatened or influenced to do a pointing out, he answered yes, his hands were handcuffed and trampled on and a bag was pulled over his head. The magistrate agreed with the submission that the officer who asked the question should have asked further questions to ensure that any pointing out which was done was unassailable. It seems from the judgment that photographs were taken of the injuries to the first appellant's wrist.

[28] The document recording the pointing out by the third appellant reflected that the pointing out was conducted on 9 February 2007 by Captain Xinwa, who communicated with the third appellant in isiXhosa. The third appellant was brought to Xinwa by January. The rights which were explained to the third appellant were as follows:

> "The mentioned person is informed that he is in the presence of a Justice of the Peace, an officer of the South African Police Service. He is warned that he/she is not compelled to point out any scene(s) and or point(s) on the scene(s) or to say anything about it. The mentioned person is further warned that whatever he may point out or may say, will be noted and photographs of the scene(s) and/or points will be taken which may be used later as evidence in a trial. He is also warned of right to legal representation (lawyer/advocate), namely that he has the right, from this moment, to consult with and be represented by a legal representative of their choice and where he cannot obtain the services of a legal representative (for example if he cannot afford one) which could lead to a substantial injustice, he can immediately request the State to supply a legal representative."

[29] According to the document, the third appellant declined legal representation, said that he understood the warning given to him and said that he was prepared to point out the scene or points. When asked where he obtained knowledge about the pointing out that he intended doing, he answered that it was from the investigating

officer. He answered "no" when asked if he had been assaulted, threatened or influenced in any way by anyone to conduct the pointing out. He disclosed injuries which had been inflicted by his father long ago and suffered in a fire at his home. The pointing out was noted as follows:

> "The pointer indicates that we must turn right at Addo Main Road 10:47. The pointer indicates that we must turn left R336 Kirkwood 10:49. The pointer indicates that we must turn right in Holskoffel Road 10:53. He indicates that we must turn Southborne Street. The pointer indicates turn in the farm of Southborne where the (sic) entered. They used the fence at the back of the houses. The pointer shows where the (sic) entered the yard through the back gate 11:04."

[30] After that the notes did not record any further pointing out and amounted to a confession, taking up a full page, with the third appellant speaking in the first person (I or we). He recounted without interruption events from the time he and others entered the premises to the time they left. There is no indication in the notes that after he began confessing he was warned not to make a confession.

[31] The third appellant testified in this trial within a trial. He said that Botha and January had assaulted him after his arrest and that Botha had sprayed pepper spray in his eyes and told him to tell the truth. Botha then fetched an interpreter, Nono, who told him that Botha was going to take him to the farm. The third appellant did not sign any documents prior to going to the farm and was told by Botha to sign after he returned from the farm. While in Botha's office Botha told him that he should speak with other persons and told him what he should point out. The next day he went to the farm with a captain. Prior to leaving for the farm the captain told him that Botha had told him to take the third appellant to the farm. The third appellant agreed to go because Botha had told the captain to take him. The vehicle in which they travelled was driven by another police member. He did not point out the way to the farm

because he did not know the road to the farm. The driver knew the way to the farm. A photograph showed the third appellant pointing in a certain direction and a second photograph showed him next to a gate. He said he was told by Botha that he should point out two gates. He was not told to point anything else out. There were no other photographs of him pointing anything out. He did not tell the captain that it was the first time he had been at those gates or that he had been assaulted, because Botha had threatened to assault him if he did not do the pointing out. He knew nothing about his statement contained in the pointing out document and did not know where the captain got the information.

[32] The magistrate accepted that the document recording the pointing out proceedings was completed in a regular manner and that the evidence contained therein was obtained in a regular manner. He relied particularly on the third appellant's consent to the handing in of the record of the pointing out proceedings and his agreement that the contents were correct. He regarded the third appellant's version as false and completely contradictory to what he had agreed to.

[33] The first appellant testified and denied committing the offences. He said on the day of his arrest he was called by one Lerato who had a problem with his car radio. The police arrived at Lerato's room, pointed firearms at them and ordered them to lie on the ground. He took the police to his house where nothing was found. The police then took him and Lerato back to Lerato's room. Lerato told the police it was his room. The first appellant used to use this room to meet other women so that his wife did not find out. The last time he had been there was a week ago. He did not have a key to

this room and used to borrow the key from Lerato. The police found a rifle in the room, hidden against a wall. The first appellant had never seen this rifle before and did not know how it got there. He and Lerato were arrested and detained, but Lerato was later released.

[34] With regard to the Isuzu bakkie, the first appellant said that around 26 or 27 December 2006 Majali arrived at his home and asked him to go with him to the location. There they met one Nqcenu, whereafter Majali gave keys to the first appellant and showed him an Isuzu bakkie. The first appellant drove the bakkie and followed Majali to Tapi's home, where Tapi got into the bakkie. They drove to Motherwell where they stopped at a garage. Majali came to them and told them to give the keys to two men who arrived there. The keys were handed over and the first appellant, Majali and Tapi returned to Addo.

[35] After the first appellant had closed his case, the magistrate recalled Botha with regard to Lerato. Botha was not aware of the arrest of Lerato and there was no record of his detention in the cells.

[36] The second appellant testified that on 15 January 2007 he left a brown bag and a red bag with his aunt Mrs Speelman. Both bags contained clothes which he wanted to take to his mother to wash but she was not there. He intended to return to Mrs Speelman to collect the clothes. He had picked up the brown bag (it was not in dispute it was the stolen unique briefcase) on the railway line on the morning of 15 January 2007, quite near to his house. At the time he was herding goats over the railway line. He thought someone must have thrown the briefcase from the train. Later he opened

the briefcase and saw that it contained remote controls and a tin of spray. He unzipped a compartment and found a firearm. He did not think that what he found was stolen property. He took the firearm out of the briefcase so that he could put clothes in the briefcase for his mother to wash. He hid the firearm under the mattress of his grandfather's bed.

[37] When his grandfather arrived the next day he told him what he had found and his grandfather said that because it was a firearm they should phone the police. The second appellant phoned the police. The officer who answered told him not to play games and put the phone down. His grandfather then said he should throw the firearm away and he decided to throw it in the dam the following day. His grandfather locked the firearm away. On his way to the dam the next day the police stopped their vehicle next to him in a manner which made him frightened. If he had not moved over the vehicle would have run him down. He ran away, threw the firearm into a drum and ran home, where he was arrested.

[38] The third appellant testified that he had done the pointing out because Botha had told him to point out two gates. Botha did not tell him where the farm was. He did not tell Captain Xinwa that Botha had told him to do a pointing out but did tell him that he had been assaulted. He did not know where Captain Xinwa obtained the information contained in the statement and said he had told his attorney that he had not made any statement. He denied committing the crimes.

[39] The magistrate rejected the evidence of the first appellant in relation to the bakkie and the rifle, as a fabrication. He similarly rejected the second appellant's

evidence concerning how he came to be in possession of the briefcase and the revolver. Applying the so-called doctrine of recent possession he found that they participated in the robbery. He convicted the third appellant on the basis of the statement he made to Xinwa, relying particularly on the third appellant's confirmation that it had been correctly recorded.

The first appellant

[40] In my view the evidence regarding the bakkie is insufficient to connect the first appellant to the crimes. Tapi agreed that the interaction with the first appellant could have been earlier than 30 December 2006. The bakkie was never recovered and accordingly not identified by the Rigbys. Further there was a contradiction between Tapi's evidence and his police statement, regarding what the first appellant said to him about the theft of the bakkie.

[41] With regard to the discovery of the rifle, there were contradictions between the evidence of Martin and Oosthuizen. According to Oosthuizen the shack was open, whereas Martin said it was unlocked by the first appellant. If it was open, this would not exclude access by other persons. The furnishing of the shack accorded with the first appellant's evidence that he used it to meet women secretly. It could not be disputed by Martin that the first appellant's marital home was elsewhere. The appellant's conduct in co-operating with the police and taking them to the shack which they otherwise would not have known about, could be consistent with guilty knowledge or equally consistent with no knowledge of the firearm, or at least no intention to possess the firearm. If the version involving Lerato was not put to Martin when he

originally testified (that is what the magistrate said in his judgment) and Lerato's involvement was a fabrication, that does not in my view alter the effect of the State's evidence in this regard, which in some respects, including his immediate reaction that he did not know of the firearm, supports the first appellant's claim of lack of knowledge of the firearm.

[42] It is so that there is a great deal of suspicion concerning the first appellant's involvement in the crimes. However that suspicion is insufficient to find that the State proved his guilt beyond a reasonable doubt. His appeal should therefore succeed.

The second appellant

[43] In *Mothwa v The State* [2015] ZASCA 143 at paragraphs [8] to [10] the following was said (footnotes omitted):

> "[8] The doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence. The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, the readiness with which the property can or is likely to pass to another person.
>
> [9] There is no rule about what length of time qualifies as recent. It depends on the circumstances generally and, more particularly, on the nature of the property stolen. If the property stolen is commonplace the time might be very short as it is always easy to trade it. It can thus change hands easily and much quicker. Property such as money and motor vehicles are easily circulated.
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> [10] Courts have repeatedly emphasised that the doctrine of recent possession must not be used to undermine the onus of proof which always remains with the State. It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that having been found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession."

[44] The second appellant was found in possession of the revolver and the briefcase some two weeks after the robbery. In the case of the revolver, an item which can quickly be disposed of, the lapse of time is not very short. However the briefcase was not in my view something which would lend itself to quick disposal. It was unique, the very opposite of commonplace. The lapse of time was therefore short.

[45] It is highly improbable that the second appellant received the briefcase and the revolver from two unconnected third parties. He must have acquired possession of the articles at the same time and place. The fact that he was later in possession of the articles at different times and places (on 15 January 2007 he was in possession of the briefcase at Mrs Speelman's home and on 17 January 2007 he was in possession of the revolver in Addo) suggests an intention to keep them both for his own use. In any event he did not say that he acquired the articles from someone else. His explanation for possession was clearly a fabrication. It is grossly improbable that a thief or robber would abandon stolen property, especially a firearm, on a railway line. It is grossly improbable that the police would dismiss information about a firearm. While false evidence does not always warrant the most adverse inference (see *S v Mtsweni* 1985 (1) SA 590 (A) at 593I-594A), in the case of the second appellant in my view it does justify an inference of guilt. His version was an innocent possession of the revolver with the intention to give it up to the police or to throw it away. However his conduct when confronted by the police speaks to the contrary. In all the circumstances I am of the view that the magistrate was correct in drawing the inference that the second appellant was one of the perpetrators of the crimes.

[46] The magistrate found, correctly, that the group which committed the assaults and robbery acted with a common purpose. This was clearly apparent from the evidence of the Rigbys.

[47] The second appellant's appeal against convictions must therefore fail.

The third appellant

[48] Although the third appellant admitted that the contents of the pointing out document were correctly recorded, when he testified, he said that he had been assaulted and threatened with assault if he did not do the pointing out. In his warning statement he indicated that he was prepared to point out what he knew about the incident. This suggests a willingness to provide information rather than do a pointing out. By this time the police knew the details of the crimes and the first and second appellants were already implicated. A pointing out would not aid the investigation of the crimes, other than to obtain self-incriminating evidence from the third appellant. In these circumstances the suggestion of a pointing did not make sense. As was said in *S v Mabaso* 2016 (1) SACR 617 (SCA) at para [6]:

> "After all, the purpose of a pointing-out under s 218 (2) of the [Criminal Procedure Act][1] is not to extract a confession, but to obtain evidence of something pointed out by the accused or discovered as a consequence of information given by the accused."

[49] The situation, in my view, is tantamount to a confession in the guise of a pointing out. (See *Mabaso* (*supra*) at para [12] and the authorities referred to therein.) When the third appellant made his confession, he was, according to the document, not

[1] Act 51 of 1977

pointing anything out at all. It is notable that Xinwa did not specifically at the outset warn the third appellant that he was not obliged to make any confession or admission. The warning specifically related to a pointing out and anything the third appellant might say about what he pointed out. The whole purpose of the excursion to the farm was to do a pointing out, not to make a confession. Effectively the pointing out ceased and a confession was then made. This is not the purpose of s 218 (2) of the Criminal Procedure Act.

[50] There was no other evidence implicating the third appellant. This factor is of importance in deciding against the admissibility of the statement he made to Xinwa. In *S v Magwaza* 2016 (1) SACR 53 (SCA) Ponnan JA said at paragraph [18]:

> "If it is accepted, as I think it must be, that the appellant was not properly warned of his constitutional rights, then it must follow that there was a high degree of prejudice to him because of the close causal connection between the violation and the conscriptive evidence. For, plainly, the rights infringement resulted in the creation of evidence which otherwise would not have existed. And as it was put in *R v Ross* (1989) 37 CRR 369 at 379 ' . . . the use of *any evidence* that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair.'

[51] In my view because of the inadequate explanation of rights, the misuse of s 218 (2) of the Criminal Procedure Act and the fact that there was no other evidence other than the third appellant's self-incriminating evidence, the admission of the statement to Xinwa rendered the trial unfair.

[52] In addition, although the third appellant did not testify in the first trial within a trial, cross- examination of Nono and January contained allegations of assault. Botha's testimony was not reconstructed. The magistrate merely said that it would

have been irresponsible to reject Botha's evidence, suggesting that he did not accept it without qualification. Botha's evidence is not before us to evaluate. We cannot assume that the magistrate was correct not to reject it. It is in my view an important factor in deciding the third appellant's appeal. An assumption that the magistrate was correct, without having the benefit of Botha's evidence, would deny the third appellant his full right of appeal. It is significant in my view that the magistrate found it probable that the first appellant had injuries. He could only have made that finding from the evidence of Botha. If one suspect was assaulted and subsequently made a pointing out, it is not improbable that the same would occur with another suspect.

[53] In *Magwaza* (*supra*) at paragraph [20], Ponnan JA, with reference to authorities, highlighted the importance of what takes place prior to the making of a confession, as follows:

> "In *R v Ndoyana & another* 1958 (2) SA 562 (E) at 563 De Villiers JP made the point that:
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> > 'The circumstances which led up to an accused person's appearance before a magistrate or justice of the peace to make a confession are not less important than the circumstances surrounding the actual making of the confession.
> > From the time an accused person is arrested until he is allowed on bail or brought to trial he is in the custody, power and control of the police. If before his trial he expresses the desire to make a confession the police will know the exact circumstances under which he came to express this wish and everything that went before and led, or could have led, up to it. Evidence of these circumstances should be given.'
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> And in *S v Majozi* 1964 (1) SA 68 (N) at 71E-G, Harcourt J put it thus:
>
> > 'As long ago as *R v Gumede* 1942 AD 398 it was stressed that the interposition of the magistrate or justice of the peace should not be permitted to give an aura of respectability and admissibility to a statement which might be suspect in regard to it being motivated by previous events. One must not permit the proceedings before the magistrate or justice to draw a veil between the preceding events and the completed confession. The preceding events should be investigated to convince the Court beyond reasonable doubt of all the requirements in the section set out.'"

[54] The circumstances of the taking of the warning statement are not fully known. The third appellant's evidence of being told what to point out by Botha was supported

by the fact that all he pointed out were the two gates. There was no indication in the pointing out documents that he pointed out anything else. It is also significant that he told Xinwa that he obtained knowledge about the pointing out from the investigating officer. In all these circumstances, even if one accepts that the third appellant was adequately warned by Xinwa with regard to a confession, I am not satisfied from the available evidence contained in the record that it was proved that the pointing out and subsequent confession were voluntarily made, and did not take place in violation of the third appellant's constitutional right not to be compelled to make a confession or an admission which could be used as evidence against him.

[55] The third appellant's appeal against convictions must therefore succeed.

Sentence – second appellant

[56] At the time of sentencing the second appellant was 23 years old. He and his partner had two minor children. He had attained grade 12 at school and was self-employed running a spaza shop. He had the following previous convictions: two counts of housebreaking with intent to steal and theft committed in 1999 and 2000 respectively and a drug related offence committed in 2002.

[57] While the offences of which the second appellant was convicted were extremely serious and warranted a substantial term of imprisonment, the cumulative effect of the sentences induces a sense of shock and needs to be ameliorated. I intend to do so by ordering portions of the sentences to run concurrently.

[58] The following order will issue:

[58.1] First appellant Mzukisi Witbooi

The appeal succeeds. The convictions for two counts of attempted murder, robbery with aggravating circumstances and unlawful possession of a firearm, and the sentences imposed therefor, are set aside.

[58.2] Second appellant Mabhuti Mithyo

[56.2.1] The appeal against convictions is dismissed.

[56.2.2] The appeal against sentence succeeds. The sentence imposed by the magistrate is set aside and substituted as follows:

(a) Count 1 attempted murder 15 years' imprisonment

(b) Count 3 attempted murder 15 years' imprisonment

(c) Count 4 robbery with aggravating circumstances 20 years' imprisonment

(d) Count 6 and 7 unlawful possession of a firearm and unlawful possession of ammunition, taken together for the purpose of sentence, 3 years' imprisonment

(e) The sentences imposed on counts 1 and 3 are to run concurrently.

(f) 13 years of the sentence imposed on count 4 are to run concurrently with the sentence on count 1.

(g) The sentence imposed on counts 6 and 7 is to run concurrently with the sentence imposed on count 1.

(h) The effective sentence is 22 years' imprisonment.

(i) The sentences are antedated to 30 November 2009.

[58.3] Third appellant Eric Lolwana

The appeal succeeds. The convictions for two counts of attempted murder and one count of robbery with aggravating circumstances, and the sentences imposed therefor, are set aside.

_____
J M ROBERSON
JUDGE OF THE HIGH COURT

LOWE J

I agree

_____
M J LOWE
JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Ms NM Mazibukwana, Legal Aid South Africa, Grahamstown

For the Respondent: Adv H Obermeyer, Director of Public Prosecutions, Grahamstown