IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. CC03/2017

In the matter between:

THE STATE

VS

VUSUMZI BOMVANA **ACCUSED**

JUDGMENT

Jolwana J

[1] The accused was indicted for the following offences:

Two counts of murder, attempted murder, alternatively conspiracy to commit murder, two counts of unlawful possession of firearm and two counts of unlawful possession of ammunition.

[2] The accused entered a plea of not guilty and provided the following plea explanation:

> "I plead not guilty to all the charges put to me and deny having been involved in their commission based on the following grounds.
>
> 1.1 That I did not kill the deceased in counts 1 and 8, neither did I conspire with anyone to kill them.
> 1.2 That I did not conspire to kill the complainant in count 2.
> 1.3 That I deny having possessed or being found in possession of the firearm in counts 3 and 9 and neither was I ever found in possession of ammunition in respect of counts 4 and 10.

1.4 That I was never at the scene of crime during the commission of the alleged offences herein and I dispute further having acted in concert or in common purpose with whoever committed such offences.

2. The following facts are not in dispute and I do admit same:

2.1 That the deceased in counts 1 and 8 died on the dates stated on the indictment.

2.2 That the deceased referred to in counts 1 and 8 died as a result of intracerebral haematoma, fractured skull and brain haemorrhage respectively."

[3] The police received ballistic reports which indicated that the same firearm was used in committing the murders and the attempted murder that they were investigating. Further police investigations revealed that one Oyama Matshaya had been arrested in connection with the unlawful possession of the firearm that was used in the commission of these offences. The police established that he was in prison for an unrelated crime. They interviewed him and he told them that he had purchased the firearm from the accused. This is more or less the only evidence that led the police to the accused.

[4] The chain evidence relating to the ballistic reports was not challenged. The relevant witnesses mainly testified about the integrity of the chain evidence as well as how the conclusions made therein were reached based on the scientific methods of compiling ballistic reports. The ballistic reports showed that the empty cartridges found in the crime scenes in respect of these offences were fired from the same firearm. All the crime scene evidence was not in dispute.

[5] Thereafter the state called some of the members of the Directorate for Priority Crime Investigations who played different roles in the arrest of the accused. The commissioned officer to whom the accused made a statement that the state sought to have admitted as a confession in terms of section 217 of the Criminal Procedure Act 51 of 1977 also testified. I will deal with the said statement later in this judgment.

[6] The state called the investigating officer, constable Simlindile Skwatsha. He testified that he was investigating the murder of Mr Zolile Maxwell Dunga, the

deceased in count 8 who was shot and killed on the 13 November 2012 at Kenyon Street, Northcrest, Mthatha. He was analysing this docket when he found a copy of another docket in which it appeared that a person had been arrested for being in possession of an unlicensed firearm. He also found a ballistic report linking some cases with the one he was investigating. He established that Oyama Matshaya (Oyama) had been arrested for the unlawful possession of the firearm that was used in the commission of these offences that were linked ballistically. He further established that Oyama was at a remand centre at Wellington Prison in Mthatha for an unrelated crime.

[7] He proceeded to Wellington Prison where he interviewed Oyama on the 08 June 2016. The interview revealed that Oyama had shared a prison cell with the accused. Oyama later met the accused in December 2012 when both of them had been released from prison. It was at this time that Oyama informed the accused that he needed a firearm. On the 15 December 2012 the accused sold him a firearm and warned him to be careful as the firearm had been used in the commission of other offences.

[8] On the 19 December 2012 Oyama was arrested at Vulindlela Heights in Mthatha for the unlawful possession of the firearm and 12 rounds of ammunition which he bought from the accused. Mr Skwatsha further testified that when his attempts to find the accused failed he decided to go back to Oyama for his assistance in locating the accused. He, together with other police officers took Oyama from prison and he directed them to Slovo Park in Mthatha but they eventually found the accused at a building site in Decoligny. Oyama was in a different vehicle with other police officers which was behind his vehicle.

[9] On their arrival constable Skwatsha told the accused that they were police officers and that he wanted to interview him at their offices. He agreed and they proceeded to their offices with him. Before the interview commenced he

informed him of his constitutional rights. He told him that the interview was about the possession of the firearm. At that stage the accused was not aware that Oyama was with the police as he had remained in town. The interview was conducted by him and colonel Mdingi.

[10] They told him that Oyama was alleging that the firearm used in the murder cases they were investigating was sold to him by the accused. The accused then told them of his involvement in the murder of Mr Dunga and the attempted murder of Mr Mbopha of Corana in Ngqeleni. However, he had no knowledge about Oyama. They then decided to ask the other officers to bring Oyama to the office in which the interview was conducted. On his arrival Oyama told them that he knew the accused and he is the person who sold him the firearm. The accused did not dispute this. He left the accused with colonel Mdingi to take Oyama back to prison.

[11] On his return the accused was no longer in the interview room. On enquiry he was told that the accused had gone to make a statement. He arrested the accused after he had made the statement when he came out of the office in which he made a statement.

[12] Under cross-examination constable Skwatsha contradicted himself initially saying he did not ask Oyama about the murder of Mr Dunga, to later saying he did ask him about murder which he denied but admitted having been in possession of the firearm. He also testified that they questioned the accused about the murder and not about the possession of the firearm. He later changed to say that they asked the accused about the firearm and he told them that he sold the firearm but did not disclose who he sold it to. He testified that the accused told them that he knew about the murder of Mr Dunga in Northcrest. In trying to explain some of the contradictions between what he said in his statement and what he said in court,

he testified that in the statement he was summarising the events and minimizing as much as he could.

[13] There were many contradictions between the evidence in chief of constable Skwatsha and his evidence under cross-examination as well as the version that is contained in his statement. I do not deem it necessary to list them save to point out that they all rendered his evidence so confused and confusing and in some respects to be so improbable as to be false.

[14] The state indicated its intention to lead evidence relating to the statement made by the accused to a commissioned officer who is a member of the South African Police Services. The defence indicated that it objects to the admission of the said statement for the following reasons:

(i) That the statement was unconstitutionally obtained as the accused was never informed of his constitutional rights before the statement was taken from him by the police.

(ii) That the statement was obtained involuntarily from the accused as he was subjected to assault or torture in order to make a self-incriminatory statement by the police and consequently he obliged.

[15] The state then applied for the opening of a trial-within-a-trial in order to lead evidence to establish that the said statement was obtained in compliance with the provisions of section 217 of the Criminal Procedure Act. That application was granted.

[16] The state called colonel Mdingi who testified that he is the commander of the Directorate for Priority Crime Investigations. They had information that one Oyama Matshaya had previously been arrested for unlawful possession of a firearm in respect of which they had a ballistic report linking it to some of the cases they were investigating. The said Oyama Matshaya was incarcerated at

Wellington Prison for an unrelated offence. He gave instructions that Oyama should be fetched from prison so that he could find out from him if the said firearm which had been used in taxi related violence was with him or not during the time when those offences were committed.

[17] The investigating officer, constable Skwatsha brought Oyama to their offices and he, colonel Mdingi led the questioning in their boardroom. They established that Oyama bought the said firearm from the accused who stayed at Chris Hani informal settlement. He together with a team of about ten police officers, including constable Skwatsha and captain Bambalele went in two vehicles to look for the accused. Eventually they found him at a building site in Decoligny where he was building a structure with other people who were assisting him. They requested him to come to their offices with them as they needed him to clarify something, pointing out that he was not under arrest. He agreed and boarded in one of their vehicles and they proceeded to their offices in the CBD in Mthatha.

[18] In their boardroom he asked him if he knew Oyama Matshaya to which he responded in the affirmative. He then informed him that Oyama Matshaya was alleging that the accused sold him a firearm which the accused denied. He asked for Oyama who was then in another office to be brought into the boardroom for what he termed "confrontation" between the two. Oyama was brought in and he asked him if he knew the accused and he said yes he is the one who sold him a firearm that was found in his possession. Accused did not deny or admit Oyama's allegations. Oyama was then taken to another office.

[19] He then questioned the accused about what Oyama said. The accused, in the absence of Oyama, admitted that he knew about the firearm. He then instructed constable Skwatsha to arrest the accused. Constable Skwatsha informed the accused that he was under arrest and informed him of his rights. Colonel Mdingi

informed the accused that the said firearm had been used in taxi related violence. The accused admitted being involved in the murder of Mrs Kozana of Slovo Park and the murder of Mr Dunga of Northcrest. He then informed the accused that a statement in relation to these murders would be obtained from him by an independent commissioned police officer who was not involved with the investigation. The accused agreed to make the statement.

[20] He then asked for the assistance of brigadier Manyana in obtaining a statement from the accused. At that time he was a colonel working at Crime Intelligence which was not involved in their investigations and he did not know about the case. He denied that the accused was assaulted or tortured.

[21] Under cross-examination colonel Mdingi not only contradicted some of his evidence in chief but also his evidence was contradicted in some respects by some of the other state witnesses who also contradicted each other. Without detailing all of them I will list some of the contradictions which were also pointed out by the defence attorney, Mr Njisane:

(i) Colonel Mdingi stated in his evidence in chief that he never questioned Oyama about the murder cases. On the contrary both constable Skwatsha and captain Bambalele testified that Oyama was in fact questioned about murder cases.

(ii) Colonel Mdingi testified that the accused was not a suspect at the stage when they went to fetch him from Decoligny. The purpose of fetching him was merely to get clarity from him about something which he did not mention. On the other hand, captain Bambalele conceded under cross-examination that the accused was a suspect and they fetched him from Decoligny to question him in connection with the firearm allegedly sold by him to Oyama.

(iii) Colonel Mdingi testified that the accused initially denied when questioned about the firearm without any explanation. This was contrary to the evidence of

captain Bambalele to the effect that the accused told them that he never sold any firearm to Oyama.

(iv) Under cross-examination colonel Mdingi testified that when the accused was confronted by Oyama he neither admitted nor denied knowledge of the firearm and that he came to the conclusion that since he was not denying it he was therefore admitting it. This is contrary to the evidence of captain Bambalele that the accused admitted knowledge of the firearm.

(v) In this regard colonel Mdingi contradicted his own statement which was admitted into the record as exhibit "P" in which he said:

> "I further questioned him about the firearm he sold to Oyama but he first denied. I decided to do a confrontation between Oyama and Vusumzi then he changed to say he knew the firearm and he sold it to Oyama."

(vi) Colonel Mdingi testified that the accused implicated himself only in relation to the sale of the firearm before he could be informed of his constitutional rights. This is contrary to the evidence of both constable Skwatsha and captain Bambalele who said that the accused also implicated himself in murder cases as well.

(vii) Colonel Mdingi and captain Bambalele testified that the accused was never handcuffed. This is contrary to the evidence of constable Skwatsha who testified not only that he found the accused handcuffed in the office of captain Bambalele but also that he was still handcuffed when he was taken by constable Bulana to colonel Manyana for a confession. He also explained that captain Bambalele is an elderly officer and that the accused was with him alone in his office. Therefore as he had been arrested at that time; he had to be handcuffed. Furthermore, constable Bulana who took the accused to colonel Manyana was a female officer and therefore it was necessary that the accused be handcuffed as she was alone in taking him to colonel Manyana. In addition to these contradictions the evidence

of constable Skwatsha was characterised by evasiveness, inconsistences and improbabilities all of which rendered it palpably false.

[22] I must point out that it was the evidence of colonel Mdingi and other state witnesses that at Decoligny where the accused was taken, before the interview commenced at their offices and during the interview the accused was not informed of his constitutional rights up until he implicated himself. He was then arrested and informed of his constitutional rights. The explanation for the accused not being informed of his constitutional rights was that at that stage he was not a suspect. It boggles the mind that the accused could have been regarded as not being a suspect in circumstances in which, firstly, Oyama had told the police that he bought the firearm from the accused. Secondly, the accused had, during the sale of the firearm, told Oyama that it had been used in the commission of some undisclosed offences. Thirdly, the very same firearm was linked by ballistic reports that were in the possession of the police to the taxi violence related cases that the police were investigating.

[23] It is clear that the police branded the accused as not being a suspect so as to obtain admissions from him which they might otherwise not get if they had informed him of his rights. In order for them not to be obliged to inform him of his constitutional rights they decided, disingenuously to tag him as not being a suspect. This, notwithstanding the information they obtained from Oyama which they believed, followed up and which led to the accused being taken from Decoligny to their offices where he was questioned until he implicated himself.

[24] This brings me to section 35 (5) of the Constitution which reads as follows:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[25] In *Magwaza v S* 2016 (1) SACR 53 (SCA) para 21 Ponnan JA had this to say:

> "Both the trial court and the full court focused solely on the voluntariness of the appellant's conduct. Neither touched even tangentially, on the Constitution's exclusionary provision - s 35 (5), or appeared to appreciate as Van der Merwe in PJ Schwikkard *et al, Principles of Evidence* 3ed (2009) para 12.9.7 points out:
>
> *'If an accused was not prior to custodial police questioning informed by the police of his constitutional right to silence, the Court might in the exercise of its discretion conclude that even though the accused had responded voluntarily, all admissions made by the accused to the police should be excluded in order to secure a fair trial.'"*

[26] The court cited with approval the case of *S v Melani & Others* 1996 (1) SACR 335 (E) at 347 e-h in which Froneman J made the following salutary observations:

> "The right to consult with a legal practitioner during pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which "have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decisions" (in the words of Kentridge AJ in Zuma's case). In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognise the importance of informing an accused of his right to consult with a legal advisor during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged sections of the community having to bear the brunt of not recognising the right to be informed of the right to consultation with a lawyer."

[27] These sentiments are especially apposite in this case in which members of the Directorate for Priority Crimes Investigations otherwise known as the Hawks organised themselves into an army of about 11 officers, including the Commander of the Hawks in Mthatha colonel Mdingi and captain Bambalele both of whom are long-serving senior members of the South African Police Services

descended on the building site of the accused, an uneducated man, who was with some ordinary young men from the surrounding poor communities which were building a structure in a site at Decoligny.

[28] According to colonel Mdingi they asked the accused to come with them to their offices as they sought clarity from him, but did not disclose what the clarity was sought about. He was informed that he was not under arrest. The question then is, was he really not under arrest? This has nothing to do with whether he was informed that he was under arrest or not. Even accepting the evidence of the police officers who testified that the accused was not handcuffed, does that necessarily mean that he felt that he was not being placed under arrest in the circumstances? Courts should be extremely loath to accept police's assertions, even under oath, that a person was not under arrest simply because they say so or was not handcuffed or was not informed that he was under arrest.

[29] Courts should probe as to whether the circumstances of the case are such that the accused would have understood that he was not obliged to go with the police immediately. It becomes significant to check whether the accused would have been able to challenge the authority of the state as represented by the police where he felt that the police were on a fishing expedition. If the courts fail to examine these difficult issues, they might be unwitting participants in the use of the judiciary to lend legitimacy to the abuse and trampling by the police of the constitutional rights of the citizenry.

[30] The fact that crime and even violent crime is rampant in this country is no excuse for the police to brazenly ignore basic requirements of policing, like advising a suspect of his constitutional rights against self-incrimination. It is similarly no basis for the courts to be tolerant of such infractions where they occur. To do so would be to undermine the very democratic principles on which this country is founded and to render illusory the very constitutional values which

the courts must use to ensure that all the citizens enjoy equal protection of the law regardless of the state of poverty or level of education. This is very important in our country where the majority are poor and illiterate and are therefore unlikely to protect themselves from potential abuse by those who exercise state power like the police.

[31] In the circumstances of this case and the exercise of the relevant discretion I have come to the conclusion that there is no justification for the admissions to be ruled compliant with section 217 of the Criminal Procedure Act. I therefore ruled that the confession made before colonel Manyana was inadmissible.

[32] The last witness for the state was Oyama Matshaya. The state made an application in terms of section 169 of the Criminal Procedure Act for the hearing of the evidence of this witness to take place at his home in Chris Hani informal settlement in Mthatha. The reason for this was that the said witness was paralysed from the upper body all the way down such that he is able to move his hands only. Therefore, it would not be possible to bring him to court as he could not even sit on a wheelchair. The defence did not oppose the application and I therefore granted it. Section 169 of the Criminal Procedure Act provides as follows:

> "A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient that the proceedings be continued at any place within its area of jurisdiction other than the one where the court is sitting, adjourn the proceedings to such other place, or, if the court with reference to any circumstance relevant to the proceedings deems it necessary or expedient that the proceedings be adjourned to a place other than the place at which the court is sitting, adjourn the proceedings, on the terms which to the court may seem proper, to any such place, whether within or outside the area of jurisdiction of such court, for the purpose of performing at such place any function of the court relevant to such circumstance."

[33] In granting the application I imposed the following conditions relevant to the conduct of a fair trial:

1. That the proceedings shall proceed at the home of Oyama Matshaya for the purposes of hearing his evidence.

2. That arrangements shall be made for all court officials to be present.

3. That arrangements shall be made for all counsel to be able to take all the notes as they would take in any trial, if they so desire.

4. That the state shall make proper arrangements for the evidence of this witness to be heard in a safe environment.

5. That all proceedings shall be recorded mechanically with suitable mobile recording equipment.

6. That the accused shall be cross-examined in the normal way by defence counsel, if he so decides.

[34] Indeed the proceedings moved to the home of Oyama Matshaya on 12 July 2018 where he testified for the state. However, his whole evidence was, in most material respects, contrary to what all the state witnesses said about him. He even denied knowing or even meeting the accused in 2012, the year on which he is alleged to have bought a firearm from him. His evidence was that he only met the accused in 2013. He testified that he was indeed arrested in 2012 for unlawful possession of a firearm. And he testified that on the day of his arrest he was in a venture motor vehicle with seven other passengers travelling to Zimbane in Mthatha. When they were at Southernwood the vehicle was stopped by the police who searched the vehicle and found two firearms in the vehicle. The firearm for which he was charged was not found in his person. However, only two of them were arrested and were taken to the Embasy police offices in Mthatha. This is how he got arrested for the unlawful possession of the firearm. At some stage he was fetched from prison by constable Skwatsha who asked him about the said firearm. He told him that he knew nothing about the firearm except that it was found in a vehicle in which he was a passenger together with six other passengers.

[35] On the day on which he was taken to the Organised Crime Offices the police requested his cellphone which he gave to them. They paged it and saw the name of the accused and they asked him about the accused and he told them that he knew the accused and that he stayed at Mandela Park informal settlement. One of the officers seemed to know the accused and gave a description of the accused and he confirmed it. They took the phone number of the accused and called him. They later brought the accused in handcuffs. The accused asked him what was going on and he said he did not know. He denied telling constable Skwatsha that he bought a firearm from the accused. He further denied making a statement to constable Skwatsha on the 08 June 2016 about the sale of a firearm.

[36] The defence did not cross-examine this witness. The state closed its case. The defence moved an application in terms of section 174 of the Criminal Procedure Act on the basis that there is no evidence on the basis of which a reasonable court might convict.

[37] Section 174 provides that:

> "If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it any turn a verdict of not guilty."

[38] In *S v Phuravhatha & Others*, 1992 (2) SACR 544 (V), Du Toit AJ at page 550 stated that:

> "The presumption in favour of innocence, the fact that the onus rests on the state as well as the dictates of justice in my view will normally require an exercise of the discretion under s 174 in favour of an accused person where the state case is virtually and basically non-existent. Strengthening or supplementation of a non-existent state case is a physical impossibility."

[39] Furthermore, in *S v Lubaxa* 2001 (2) SACR 703 (SCA) para 18 the Supreme Court of Appeal cemented the legal position as articulated in *S v Phuravhatha* and other cases in the following terms:

> "I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively on his self-incriminatory evidence."

[40] In this case Mr Makubalo counsel for the state conceded that indeed there is no legal basis on which the state can oppose the application as there is no evidence on which the accused could be convicted.

[41] In the result I make the following order:

1. The application in terms of section 174 of the Criminal Procedure Act is granted.

2. The accused is found not guilty and discharged.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: M MAKUBALO

Instructed by: NDPP

MTHATHA

Counsel for the Accused: S NJISANE

Instructed by: LEGAL AID BOARD

MTHATHA

Matter heard on: 18 July 2018

Judgment handed down on: 20 July 2018