REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
Held in PRETORIA

Case no.

A739/06

Judgment reserved:02 JUNE 2008
Judgment handed down: 20 June 2008

In the matter between:

BASETSE BEN MOSHODI 1st Applicant

PIET MOJAKI PHASHE 2nd Applicant

DAVID MAKAPA MOTLOUNG 3rd Applicant

and

THE STATE Respondent

JUDGMENT

LEGODI J,

1. Before us, there are three appellants. All the

appellants are appealing against their convictions and sentences on a charge of theft of R787 756 in cash, the property of or in lawful possession of Springbok Patrols or Volkasbank.

2. The offence is alleged to have been committed on the 2 August 1998. Appellants 1, 2 and 3 were in the court aquo accused 1, 2 and 8 respectively.

3. Upon their conviction, each appellant was sentenced to 10 years imprisonment. The trial court in convicting the appellants seems to have relied on the evidence of one of investigating officers, Captain Vise and Mr Andrew Marubane who was the accused 6 in the court aquo. The accused 6 was convicted together with the appellants.

4. In a nutshell the evidence against the appellants was to the following effect:

    4.1 The three appellants were employees of Sprinkbok Patrol Services. On 4 August 1998 an armed robbery incident was reported.

    4.2 Subsequently, the police were called to the scene of the alleged offence. This was at a gravel road in the veld away from the main road in Klerksdorp.

4.3 The first and second appellants together with other employees of Springbok Patrol Services were at the scene. They were interviewed by the police and in particular, Captain Vise interviewed the appellant 1 who reported that they were robbed of the money contained in the trunk tins by several armed men, four whites and two blacks.

4.4 The investigating officer had serious reservations about the alleged robbery. The first and second appellants were further interviewed at their offices. Due to the fact that the police at this stage had nothing to implicate the appellants with, they decided not to arrest them.

4.5 The following morning appellants 1 and 2 and other employees of Springbok Patrol services were taken in for Polygraphy tests. The results were alleged to be positive in the sense that they were shown not to be telling the truth.

4.6 Appellant 1 was confronted in the presence of appellant 2, when it was suggested that their version about the alleged robbery did not match up with the result of the polygraphy test. At

that stage, appellant 2 is alleged to have turned white in a clear indication of being frightened.

4.7 Appellant 1 was further interviewed and subsequent thereto, he took the police to several places, where part of the stolen money was recovered.

4.8 Appellant 1, first led that police to his home in Sebokeng, where the appellant 1 pointed out at a big trunk tin and two bank bags which contained money. The money was round about R180 000. From appellant 1's home, he then took the police to Caltex garage, where they found accused 4, a certain Mr Samuel Bahwana. Mr Bahwana was a security guard at the garage and he was on duty. He was instructed by the police to open the safe. In the safe about R100 000 was found which was then seized by the police.

4.9 Accused 4 is then alleged to have made a statement to the police and he told the police that he got the money from the accused 6. Appellant 1 at this stage is alleged to have given the police certain information which led the police to the house of the accused 6.

4.10 At accused 6's home, the police found bank bags and an amount of between R300 000 to R400 000 was seized. Accused 6 was then also arrested.

4.11 Thereafter, the police then proceeded to the home of accused 5, apparently as a result of the information obtained from appellant 1. Appellant 1 for example, is alleged to have told accused 5 to hand over the money. Accused 5 then pulled out a bank bag which contained about R100 000.

4.12 The police then drove towards the direction of Potchefstroom, apparently as a result of the information by the accused 6. In a hole, the accused 6 pointed empty trunk tins. The trunk tins were also seized by the police. From there, they proceeded to a certain home in Ikageng Township. At this place a Cressida Sedan was seized by the police. The Cressida sedan was the vehicle alleged to have been used to carry the money from the alleged scene of robbery. A firearm was recovered at Blue Ribbon, where accused 6 was working.

5. This was in a nutshell the evidence which was tendered by the state. Just before the state closed

its case, admissions were made that on the date in question accused 1, 2, 3, 5, 7 and 8 were in possession of the said sum of R767 761 just before it was taken. Secondly, that an amount of R612 358 was recovered by the police and thus leaving a balance of R239 403 not recovered. All the accused were employees of Springbok Patrol Services.

6. At the close of the state case, appellant 2, accused 3 and appellant 3 who was accused 8 asked for the discharge in terms of section 174. This was refused. Subsequently, the three appellants and accused 6 testified in their defence. Accused 6 implicated the appellants as the people who approached him and arranged that he should come and collect the money from them. Based on the evidence of accused 6 and the investigating officer, the three appellants were found guilty as charged.

7. There are two things which worry us in this appeal. Firstly, failure to hold a trial within a trial. Secondly, the trial court's refusal to grant appellants 2 and 3 a discharge at the end of the state's case in terms of section 174 of the Criminal Procedure Act.

8. The purpose of a trial within a trial is to insulate the inquiry relating to the issue of voluntariness in a compartment separate from the main trial since it is essential that the issue of voluntariness be kept clearly instinct from the issue of the guilt. (See S V De Vries 1989(1) SA 228(A). It is a procedural device which is essential to prevent the collision or attenuation of two important rights of criminal accused. That is, the right to elect not to give evidence at the end of the state case and the right to prevent inadmissible statements being led in evidence against an accused's person.

9. The accused may at a trial within a trial give evidence on the issue of voluntariness without being exposed to general cross examination on the issue of his guilt. (**See State v Mdyogoto 2006 (1) SACR 257 (E) at 263 c-e**). The prosecution may not as part of its case on the main issue lead evidence regarding the testimony given by the accused at a trial within a trial.

10. The fact that an accused say the statement is false and has been made up by the police does not mean that a trial within a trial does not have to be hold. (**See S v Ntuli en Ander 1995 (1) SACR 158 (T) at 166 c-d**).

11. However, where evidence in respect of certain pointing out had incorrectly been considered as part of the merits were it ought properly to have been considered in a trial, the trial court was found not to have committed an irregularity by not ordering that a trial within a trial be held since the defence apart from not insisting on that procedure, had in an to a question by the court expressly indicated that the issue was not one of admissibility, but rather of accuracy and further since there was no suggestion on facts that the accused had been prejudiced by the court's failure to follow that procedure. (**See S v Mndebele 1995 (1) SACR 278 (A**).

12. Forced pointing out are not admissible because firstly, they should be treated as admissions or even confessions that are subject to the rules of admissibility. That is, they must be made freely and voluntarily. Secondly, because their reception runs counter to our legal policy that no one should be forced to give evidence incriminating himself. (**S v Shezi 1985 (3) SA 900 (A**).

13. Since it has now been accepted that pointing out fall in appropriate cases to be regarded as admissions and even in some cases as confessions and since it has now also been accepted that there

are in terms of the Constitution, requirements that an accused be informed and at certain stages of various rights including the right to be informed of the consequences of making an admission or confession and the right to legal assistance. It follows therefore that these requirements apply too, to pointing out.

14. It is the duty of a trial court to be on the alert against possible inadmissibly evidence or improperly obtained evidence.

15. Having said these, I now need to deal with the concern raised by this court. When the investigating officer was led in chief, the defence attorney disclosed to the court aquo as follows:

> *"Ek wil nou nie onderbreek nie, maar my geleerde vriend is terdeê bewus dat hier nou sekere getuienis rondom erkennings aangebied gaan word wat ek hom voorheen te kenne gegee het dit betwis word dat dit nie vrywillig ongedwonge was nie dat dit ander dwang was en dat ons teen een op 'n binne verhoor gaan uitloop, ek wild it net op rekorel plaas voordat my geleerde vriend die getuienis aanbied" (**See page 31 of the transcribed record**).*

16. The trial court said nothing to the statement by the defence and the prosecution was just allowed to proceed leading evidence of the investigation officer on both challenged evidence and on merits.

17. On page 56 of the transcribed record of the proceedings the cross-examination of Captain Vise proceeded as follows:

Question: *U sien beskuldige 1 se die uitwysings wat gedoen is, is onder dwang gedoen?*

Answer: *Beskuldige 1 het uit sy vrye wil met my kom praat.*

18. Immediately after this answer was given, the defence attorney then addressed the court as follows:

"Agbare ek weet nie wat die prosedure op hierdie stadium is nie. My instruksies van die beskuldige is dat hierdie uit wysings wat nou in Kruis verhoor uitgekom is dat dit onder dwang gedoen is. Nou week ek nie op ons op hierdie stadium 'binne verhoor kan nou nie, die toelaat baarheid daarvan?

19. The reaction by the trial court in this regard is reflected as inaudible on the record. However, the point is, no trial within trial was held even at the stage when the trial court was so warned. At this stage, when the question referred to above and when the defence attorney addressed the court as indicated above, many questions were already put to the witness clearly challenging the admissibility of the pointing out. For example, that the appellant was not warned of his Constitutional rights, that the form containing rights to an accused person was not used or referred to before the pointing out, that the appellant 1 was assaulted at his place of employment before the pointing out, that his legs were fastened together and caused to hung in a swimming pool at the premises of the appellant's employer.

20. The trial court having disregarded a call for the second time to have a trial within a trial, the defence attorney proceeded to put further questions to the witness regarding admissibility. For example, that the appellant had not eaten at the time when the pointing out were made, that during the questioning of the appellant 1, captain Vise *"het hom deur 'n masientjie ge-hoek, geskok, elektriese apparaat wat om sy penis vasgemaak"*.

21. Clearly, all these allegations were very serious and they went into the root heart of the admissibility of the pointing out. Failure to hold a trial within a trial should be found to have amounted to unfair trial, serious enough to vitiate the trial.

22. It appears firstly, that the trial court was of the view that the conduct of the appellant 1 which led to the discovery of the money stolen was not a pointing out, secondly, it appears that the trial court was of the view that the challenge to the admissibility could safely and conveniently be dealt together with the merits in one compartment. For example, on page 40 of the transcribed record, a question was put by the prosecution to his witness Captain Vise as follows: *Question: Is die beskuldigdes op enige maneer beinvloed om so uit wysings te maak?*

23. Before the witness could respond, the trial court intervened and put a question as follows:

"Hof: Ek weet nie of ons eintlik uit wysings van praat op hierdie stadium nie, Hy het nie eintlik getuig oor enige uitwysings nie. Hy se, het beskuldige het hom geneem na sy huis toe en daar het u dit gekry …(tussenbei).

Answer: Dit is reg.
Question: Daar is nie eintlik die enigste uit wysings wat ter sprake is lyk vir my is die trommels?
Answer; Dit is reg.
Question: Wat werklik, daar is ook nie 'n kwessie van uitwysing nie, julle het die goed daar gekry hy het u geneem na 'n plek toe en u het die goed daar gekry?
Answer: (Onduidelik)
Question: Maar hoe dit ook al, sy is dit vrywillig geode is hy enigsins beinvloed om dit te doen?
Answer: Nee"

24. Whilst on record, the expression by the trial court is put in a question form, this appears to have been the view held by the trial court, clearly suggesting that there was no question of pointing out and secondly, that in any event, the appellant 1 was not influenced or that the answer by the witness was that, the appellant 1 was not influenced.

25. The trial court was wrong in suggesting there was no question of pointing out. Secondly, it was wrong in allowing the evidence on admissibility without holding a trial within a trial. Remember, the purpose of a trial within a trial is to insulate the

inquiry relating to the voluntariness in a compartment separate from the main trial. It is essential that the issue of voluntariness be kept clearly distinct from the issue of guilt. But even most importantly, in a trial within a trial an accused may give evidence on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt. Appellant 1 has been denied of this right by the trial court's failure to hold a trial within a trial. For example, if a trial within a trial was held and the pointing out were found to be inadmissible, then there would not have been anything left against the appellant 1. The finding of the stolen money through the assistance of the appellant 1 could have been found to be improperly obtained. In this situation, it would not have been necessary for appellant 1 to take the witness stand in his defence. His evidence on merits was used to criticise him.

26. Appellant 1 having took the witness stand and exposed himself to cross-examination, the trial court in its judgment then concluded as follows on page 242 of the transcribed record:

"Waneer beskuldigde 1 vir die hof se dat hy weet niks van daardie geld wat by daardie huis gekry is

nie, dan speel hy nie met die hof oop karate nie. Hy is besig om die hof leun te vertel, uiteraard beteken dit dat sy hele weergawe ten opsigte van hoe hy beroof is eenvoudig nie water how nie"

27. Counsel for the state briefly sought to urge us to find that it was not necessary to hold a trial within a trial as at one stage during cross-examination and during the appellant's evidence, the appellant 1 alleged that he knew nothing about the money. This in my view, should be seen in context. Firstly, the fact that the appellant 1 suggested that it was not true that the money was found as described by the investigating officer did not justify the failure to hold a trial within a trial. In the instant case, the defence pertinently challenged the admissibility of the point out. The defence went further by insisting on a trial within a trial which was in my view just ignored by the trial court. Secondly, the denial by the appellant 1 came at a very late stage, that is, after it was placed on record that the pointing out were not freely and voluntarily made, after it was put to the witness that he had assaulted and or influenced the appellant into making the pointing out and after the trial court on two occasions had neglected to hold a trial within a trial on the request by the defence. All of these do not support the view that it was not necessary

to hold a trial within a trial. The prejudice caused to the appellant 1 was in my view more devastating and should be found to have rendered the trial court unfair.

28. Before I conclude, I need to further refer to the trial court's judgment. What is conspicuous in the judgment is the absence of the evaluation of evidence on the challenge regarding the admissibility of the pointing out.

29. Failure to deal with this aspect at all or sufficiently, in my view amounted to failure of justice. The difficulty is that, apparently the trial court never felt that there was a need to do so, as it did not regard the conduct of the appellant1 amounting to a pointing out. Secondly, it appears the trial court just simply accepted the police evidence that there was no undue influence placed and no assault on the appellant 1.

30. The trial court erred in accepting the evidence relating to the discovery of the stolen money. I now turn to deal with the issue raised regarding the appellants 2 and 3. The appellants 2 and 3 were the accused 2 and 8 respectively. Their application for a discharge at the end of the state case was refused.

31. Section 174 of the Criminal Procedure Act 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 sheet, or any offence of which the accused may be convicted on the charge, it may return a verdict of not guilty.

32. The decision to refuse a discharge is a matter solely within the discretion of the trial court and may not be questioned on appeal. However, if the court on appeal was to find that the trial court did not exercise its discretion judicially, the court on appeal may upset the decision by the trial court. The trial court can sometimes *mero motu* discharge an accused person in terms of section 174.

33. It must therefore appear from the judgment that the discretion was exercised judicially. On page 114 of the record and after the defence attorney had addressed the court on section 174, the trial court expressed itself as follows in refusing the application:
"Nee, ek is bevrees ek stem nie saam met u nie. DIE AANSOEK WORD VAN DIE HAND GEWYS TEN OPSISTE van al die beskuldigdes".

34. This is all the trial court said regarding the application in terms of section 174. In its judgment on conviction, the trial court made no reference to the application in terms of section 174 as it is normally the practice. If no reasons are given when the application for a discharge of an accused is refused at the end of the state case, then it is expected that the reasons for the refusal of an application for the discharge would be given at the conclusion of the case. I did not deem it necessary to refer the matter to the trial court to deal with this aspect.

35. At the end of the state case, there was nothing serious implicating the appellants 2 and 3. There was no evidence at all that any of the stolen goods were found in possession of the appellants. Apparently, the appellants were arrested and charged for the fact that they were employees of the complainant, Springbok Patrols and for the fact that they were with the appellant 1 on the date of the commission of the offence.

36. The principle that even if there is no evidence at the close of the prosecution case, upon which a reasonable man may convict, a discharge should nonetheless be refused if there is a reasonable

possibility that the defence evidence may supplement the state's case has fallen by the way side in the light of Constitutional imperative.

37. In any democratic criminal justice system, there is a tension between, on one hand the public interest in bringing criminals to book and on the other the equally great public interest in ensuring that justice is manifestly done to all even those suspected of conduct which would put them behind bars. To be sure, a prominent feature of the tension is the universal and unceasing endeavour by the international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by the state organs in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators, nor does it mean a pre-dictation for technical nicest and ingenious legal strategies.

38. What the Constitution demands is that, an accused person be given a fair trial. Fairness is an issue which has to be decided upon the facts of each case and the trial court is best placed to take that decision. At times fairness might require that evidence that is unconstitutionally obtained be excluded. But there will also be times when

fairness will require that evidence albeit obtained unconstitutionally, nevertheless be admitted. (**See Attorney-General Cape Provincial Division and another 1996 (2) SACR 113 (CC) at 120 h- 121 b**).

39. The principle laid down above is also applicable to the manner in which evidence relating to the pointing out in the instant case was achieved. Coming back to the issue at hand, it appears that when the trial court so refused the discharge of the appellants 2 and 3 at of the close of the prosecution's case, it had hoped either that the appellants will implicate themselves or that one of their co-accused will implicate them.

40. Remember, at the time the application for their discharge was refused, there was no indication that any one of the accused will implicate others. For example, Colonel Landman, in his evidence indicated that he had nothing to do with accused 2, 3 and 8. The evidence by the state was that accused 6 was pointed out by the appellant 1. There was no evidence at all suggesting that the accused 6 had anything to do with the appellants 2 and 3. When money was allegedly found in possession of the accused 6, he did not tell the police as to how he came into possession of the

money. For example, Captain Vice suggested that accused 6 told Colonel Landman as to where or from whom he found the money. However, this was not in line with the evidence of Colonel Landman who indicated that he had nothing to do with the accused 6. The effect of all of these is that, appellants 2 and 3 application for a discharge at the end of the prosecution case was refused without any basis. Remember, accused 6 also suggested that he was assaulted.

41. However, when accused 6 took the witness stand, he implicated all the three appellants. He alleged that he was approached by the appellants to collect the stolen money from them, although he alleged that he did not know that the money was stolen. It was as a result of this evidence coupled with the pointing out by the appellant 1 and the consequent finding of the money that the trial court convicted the appellants.

42. Few things worry me with regard to this finding. Firstly, the pointing out were not proved to have been made freely and voluntarily, especially regard been had to the failure to hold a trial within a trial and the trial court's failure to make a factual findings based on proper evaluation of the admissibility of the pointing out.

43. The finding of the money was therefore through evidence improperly obtained. There was no evidence upon which a reasonable man might convict the appellants 2 and 3 as at the close of the prosecution case and therefore they should have been entitled to be discharged in terms of section 174. Failure to do this, in my view amounted to serious irregularity which should vitiate the whole trial as unfair.

44. I find, the trial court further to have erred in relying on the evidence of the accused 6 which resulted in the conviction of the appellants. Remember, the accused 6 was also convicted as charged. In its judgment the trial court used part of the accused 6 to convict the co-accused, but also rejected his version in some parts. The evidence of the accused 6 could not safely be relied upon. Firstly, his version was never put to the appellants 1 and 2 when they testified in their defence. Secondly, the accused 6, was an accomplice or an alleged robber, and therefore his evidence should have been approached with caution. His evidence alone, would not have served to prove the guilty of the appellants beyond reasonable, safe for the evidence relating to the pointing out. The evidence, however has been

found to be seriously tainted that it should not have been considered by the trial court in the absence of admissibility determination in a trial within a trial.

45. The net result of all of these is that the trial court should have found the appellants not guilty of the offence charged.

46. Consequently, I would uphold the appeal and set aside both the conviction and sentence imposed on the three appellants.

M F LEGODI
JUDGE OF THE HIGH COURT

I, agree

T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT