IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

RC Case No. PE 277/2015

CASE NO: R 332/16

In the matter between:

BONGANI BOTHA **Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

MAGEZA AJ

[1] Appellant was found guilty on several charges by the Regional Magistrate, Port Elizabeth on 18 March 2016. No appeal was lodged in respect of the convictions save for the present appeal directed only against appellant's conviction and sentence on Count 4. This charge followed from appellant's arrest for the unlawful and intentional possession of a 9mm Parabellum semi-automatic firearm in contravention of Section 3,

read with several sections of the Firearms Control Act, 60 of 2000.

[2] The brief background facts are that appellant was arrested on 07 November 2014 by Constable Malila for, *inter alia*, the robbery of one Mzulisi Mkhondeki and a friend in Motherwell, Port Elizabeth. In the course of the robbery, appellant held-up the two at gunpoint and took two cell-phones and money from them. Immediately after the robbery, Constable Malila came upon the scene and after chasing appellant, managed to effect the arrest of appellant.

[3] In his testimony before the Magistrate, Constable Malila said on arresting appellant, he found in his possession a firearm; bullets in a cartridge; some money as well as the victims' mobile phones. He testified that after formally booking the appellant in at Motherwell Police Station, he placed the firearm inside an evidence bag to which he assigned a unique seal number (PA4000897207). The firearm described in the charge had its own unique manufacturer allocated serial no. 44020155.

[4] In granting appellant leave to appeal on this charge, the Regional Magistrate did so on the following basis:

> "... *leave to appeal was granted in respect of count 4 'based on the technicalities of how the ballistic report was handed in and the proving of this evidence'*". (my emphasis).

[5] In Appellant's Notice of Appeal dated 18 January 2017, this technical ground of appeal is articulated as follows:

AD CONVICTION (COUNT 4 ONLY)

"*1. The chain evidence in respect of the ballistic evidence is unsatisfactory in that it is unknown exactly what happened to the sealed evidence bag between the time when the firearm was collected and booked into SAP13, and the time when it was received by the author of the ballistic report.*" (my emphasis).

[6] From this will clearly be discerned that the appeal is directed at attacking the so-called 'chain evidence' concerning how the firearm was handled between its packing, sealing and booking in the SAP13 diary by Constable Malila and the receiving thereof by the State official charged with the responsibility for ballistic assessment, Warrant Officer Ntingani, who compiled and attested to the Section 212 of the Criminal Procedure Act 51 of 1977 affidavit admitted into Court.

[7] At page 91 of the Court record, it is evident that appellant did not challenge the admissibility of the ballistic report affidavit deposed to in terms Sections 212(4)(a) and 212(8)(a) of the Act. The transcript recorded the following exchange between the Prosecutor, Mrs Visagie for the defence and the Magistrate:

"PROSECUTOR: *Before Your Worship I close my case I just want to submit Your Worship an affidavit in terms of Sect. 212 of the Criminal*

Procedure Act. It is the ballistic report. Your Worship in terms of the report I just want to report it in terms of Sect. 212 of the Criminal Procedure Act. I am not sure whether the defence would have an objection to that.

COURT: *The ballistic report is admitted as evidence in terms of Sect. 212 of the Criminal Procedure Act 51 of 1977 and marked EXHIBIT A.*

MRS VISAGIE: *As the court pleases Your Worship.*

COURT: *Handed in by consent.*

MRS VISAGIE: *Before Your Worship adds that last piece I just want to find out if the state intends calling the other role players to prove the ballistic report because she never proved the chain of that firearm."*

PROSECUTOR: *Your Worship if the defence does not have any objection and it is by consent I don't think the state needs to call the person. Otherwise I will call the person if needs be."*

[8] Section 212(4) provides:

"Whenever any fact established by any examination or process requiring any skill –

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) ...

(vi) in ballistics, in the identification of fingerprints or body-prints or in the examination of disputed documents, is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection in the *Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon the mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such an affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate."

[9] This section provides for the reception of affidavits deposed to and certificates authored by a State official which on production, become *prima facie* proof of such facts. In the absence of evidence (tendered by the defence) gainsaying the findings made in such an affidavit, the contents thereof become conclusive proof of the finding(s) of fact contained therein.

[10] Our Courts have, in a long line of cases, endorsed this principle. In this division, the Court in Rululu v S 2013(1) SACR 117 (ECG), dealt with the implications of Section 212(4) affidavits. That Court affirmed the principle that, on production before a Court, these constitute *prima facie* evidence which, absent evidence led by the defence controverting the contents thereof, result in such *prima facie* evidence becoming conclusive. See also the decisions in S v Veldthuizen 1982(3) SA 413 (A); S v Britz 1994(2) SACR 687 (W) @ 690/1; S v Greef, AD case No. 640/94 in which judgment was delivered on 14 September 1995:)

[11] For purposes of completeness, the decision of Diemont JA in Veldthuizen (above) sets this principle out at page 416G-H as follows:

"*As used in this section they may mean that the judicial officer will accept the evidence as prima facie proof of the issue and, in the absence of other credible evidence, that prima facie proof becomes conclusive proof. (Ex parte Minister of Justice: In re R v Jacobson & Levy 1931 AD 466 at 478 and R v Abel 1948(1) SA 654 (A) at 661.) In deciding whether there is credible evidence which casts doubt on the prima facie evidence adduced, the court must be satisfied on the evidence as a whole that the State has discharged the onus resting on it of proving the guilt of the accused.*"

Diemont JA further held that the words 'prima facie evidence' used in s 212(4) were not to be 'brushed aside or minimised' and that they meant that 'the judicial officer will accept the evidence as prima facie proof of the issue and, in the absence of other credible evidence, that the prima facie proof will become conclusive proof'.

THE CHAIN OF EVIDENCE:

[12] Reverting back to the statement of Mrs Visagie in which she raised the necessity for the State to call *'other role players to prove the ballistic report because she never proved the chain of that firearm'*, it is necessary to distinguish between a challenge directed at a fact or facts sought to have been verified by the deponent to an affidavit made in lieu of the provisions of Section 212(4)(a), and an evidential burden, if any, on the State to prove the chain of evidence.

[13] Dealing with an analogous case in Adams v S [2012] ZAECGHC 55 (25 June 2012), this Court *per* Chetty J cited a useful guide to chain evidence from the author, Lierinka Mentjies-van der Walt, titled 'DNA in the Courtroom, Principles and Practice' in which she posits:

> *"The chain of custody requirement has two objectives:*
>
> *(a) The first is to lay a proper foundation connecting the evidence to the accused or to a place or object that is relevant to the case.*
>
> *(b) The second purpose of the chain of custody for physical evidence is to ensure that the object is what its proponent claims it to be.*
>
> *These are accomplished by ruling out any tampering with, and substantial alteration or substitution of, the evidence. If the*

substance analysed for the presence of DNA has been tampered with or altered in a substantial way, it becomes, in effect a substance different from the one originally seized and its relevance to the case disappears. Alterations performed as a result of testing of the substance, of course, do not affect the chain of custody.

In most cases, the critical links in the chain of custody are those from the time the evidence was obtained to the time it was scientifically analysed, since the latter is the time at which the integrity of the evidence is of paramount importance. The chain of custody is the means of verifying the authenticity and legal integrity of trace or sample evidence by establishing where the evidence has been and who handled it prior to the trial.

Through either evidence or admissions by the defence, the prosecution will have to show that the evidence has been kept safe, without tampering, prior to bringing it to trial. Any person who had contact with the evidence must also be accounted for."

[14] Appearing before us, Mr Geldenhuys for appellant submitted that despite the seal number allocated to the evidence bag containing the firearm at Motherwell Police Station by Constable Malila, and the unique serial number of the firearm identifying the firearm being evidently the same as that which was the subject matter of Warrant

Officer Ntingani's report, *"more evidence could have been led to prove a proper chain of evidence"*

[15] In argument, Mr Geldenhuys accepted that the arresting officer Malila testified that he found the firearm at the scene of the crime in the possession of the accused, that he took custody thereof, and after noting that it had a serial no. 44020155, he had sealed it in an evidence bag to which he allocated the seal number (PA4000897207). This bag was sent to the laboratory for testing by Warrant Officer Ntingani. It is not in dispute that the seal number (PA4000897207) of the evidence bag as well as the identity of the 9 mm Parabellum Norinco firearm bearing serial no 44020155 are the same as those referred to in the Section 212 affidavit of Warrant Officer Museli Ntingani. Without some amount of evidence being tendered before the Magistrate to show that there was tampering, substantial alteration or at worst substitution, logic dictates that the firearm and evidence bag received by the ballistic analyst Warrant Officer Ntingani are the same as those that emanated from Constable Malila.

[16] I agree with the submissions of Mrs Hendricks for the respondent that there was little doubt that the firearm with serial number 44020155 sealed by Constable Malila in the evidence bag at Motherwell Police Station with seal number PA4000897207 was the same firearm that was the subject of the Section 212(4) affidavit prepared by Warrant Officer Ntingani.

[17] The firearm left Motherwell Police station in a sealed bag after having been handled by Constable Malila. The certificate of Warrant Officer Ntingani and his findings were not disputed by appellant and the evidence contained therein including that which identified the firearm through the seal number and its serial number remained the same. In the circumstances of an object such as a firearm with a unique serial number admittedly sealed by an arresting police officer and contained in an evidence bag equally sealed with a unique seal number following internal procedures for ballistic analysis of the same firearm, it is unnecessary to expect the prosecution to detail precisely who handled the uniquely numbered firearm in the course of its being couriered, conveyed or transported to the offices of the State Official skilled in chemistry, anatomy or pathology referred to in Section 212(4) of the Act.

[18] It is not sufficient to rely on the vague, unsubstantiated or unspecified contention that the actions of handlers such as couriers or messengers between source and analyst, be detailed in order for the chain of evidence to be proved. Such a vague contention asserts no objective factual possible interference or worse, crack in the evidential chain sufficient to discredit the Section 212 findings. It amounts to nothing more than conjecture. The author of the guide titled 'DNA in the Courtroom, Principles and Practice details broadly that 'The chain of custody requirement has two objectives, *(ie)* ... to lay a proper foundation connecting the evidence to the accused... (and), The second... is to ensure that the object is what its proponent claims it to. In the present matter, the serial numbers and the seal numbers collectively secure this safe outcome.

[19] In S v Du Plessis 1972(4) SA 31(AD) at page 34C, in considering the evidential chain of blood sample or specimen, that court found as follows:

"Luidens hierdie bepaling is dit dus duidelik dat die bewering in Maurice Freiman se beedigde verklaring dat hy op 27 February 1970 'n bloedmonster gemerk "Krugersdorp R.O.M. 311/2/70 en verseël met polisieseel No. 1365 ontvang het, behoorlik by wyse van die blote voorlegging van sy beedigde verklaring prima facie-bewys is. Dit volg dus dat die Staat prima facie-bewys voorgelê het dat die bloed-monster wat Dr. Louw op 26 Februarie 1970 van respondent geneem het, en waarop hy die identifiseerende merk, "R.O.M. 311/2/70" aangebring en met amptelike seël No. 1365 verseel het, deur Maurice Freiman ontvang en deur hom ontleed is. Dit was vir die Staat nie nodig om te bewys hoe die bloedmonster vanaf Dr. Louw by Maurice Freiman uitgekom het nie. Die respondent het geen getuienis aangebied om die prima-facie bewys wat die Staat in hierdie verband voorgele het, te weerlê nie." (my emphasis).

[20] The most important rationale for proof of chain of custody is to ensure that accused persons are not convicted on the basis of unreliable and possibly contaminated or altered evidence. In this matter, no such case has even been remotely made by appellant. It is insightful that even the hesitant submissions of appellant's counsel were in substance that, '... *despite the fact that the seal numbers correspond, more evidence could have been led to prove a proper chain of evidence.*'

[21] Regrettably appellant could suggest no such fact to support the tentative challenge. As is set out in S v Du Plessis above, there being clear proof that the firearm recovered from the appellant is in fact the one tested for ballistic purposes, little else could have existed to cause doubt in the mind of the Magistrate and the conviction was, in the event, the correct finding.

AD SENTENCE:

[22] In respect of the charge the subject of this appeal, Count 4, appellant was sentenced to a 15 year term of imprisonment as provided for in Section 51(2) of Act 105 of 1997. In the course of the Magistrate's judgment on sentence, the Court noted that the offences appellant had been convicted for were collectively very serious offences indeed. The Court took into account appellant left school early and did odd jobs with a previous conviction for housebreaking with intent to steal and theft. In line with the decisions of our courts the magistrate found that youth, on its own, cannot be a substantial and compelling factor.

[23] This appeal court's power to interfere in sentences is limited as this primary role lies in the competence and discretion of the sentencing court. 'A court of appeal may not simply substitute a sentence because it prefers it and will be entitled to interfere only if the sentencing court materially misdirected itself or the disparity between its sentence and the one which this court would have imposed had it been the trial court is

'shocking', 'startling' or 'disturbingly inappropriate'. See S v Malgas 2001(1) SACR 134 (SCA) at para 12.

[24] On the facts before us there was no misdirection on the part of the Regional Magistrate for the reasons stated heretofore. Although the collective offences were extremely serious, the Magistrate ordered these to run concurrently with other counts. The sentences are justified in the light of the fact that the Court applied its mind to all traditional factors such as the nature of the crime, personal circumstances, and interests of society and there is no justification for this court to interfere with the Magistrate's findings

[25] In the result, the appeal against conviction and sentence is dismissed.

PT MAGEZA AJ

ACTING JUDGE OF THE HIGH COURT

I agree

S M MBENENGE J

JUDGE OF THE HIGH COURT

For the Appellant:	Adv D.P Geldenhys of the Grahamstown Justice Center, Grahamstown
For the State:	Mrs Hendricks of the Department of Public Prosecution, Grahamstown
Date Heard:	08 February 2017
Date Delivered:	07 March 2017