IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No: A140/2015

In the matter between:-

MOEKETSI PETRUS LELALA APPELLANT

and

THE STATE RESPONDENT

CORAM: VAN ZYL J et MHLAMBI, J

HEARD ON: 05 JUNE 2017

DELIVERED ON: 05; 15 JUNE 2017

REASONS

MHLAMBI, J

[1] On 05 June 2017 this appeal served before this court and the following orders were made:

"1. The appeal is upheld and the conviction and sentence are set aside.

2. The person in charge of the appeals of this division is requested to forthwith inform the relevant prison authorities of the outcome of this appeal."

[2] During argument, Mr Nel, the appellant's counsel, informed the court that, based on the correspondence between the appellant and Mr D. Reyneke (also attached to the office of Legal Aid South Africa) the accused's last known address during 2017 was at the Grootvlei prison near Bloemfontein. Mr Bontes, on behalf of the respondent, referred to the transcribed record and advised the court that on 6 September 2011, the accused had been granted bail pending the appeal in the amount of four thousand rand (R 4000.00) only. It was therefore evident the appellant had failed to pay the bail money. The court was of the view that in the interest of justice and fairness, it was necessary and imperative that an order as granted above, be made to facilitate the appellant's early release from prison while the full reasons for his successful appeal were being written.

[3] I now come to the reasons that gave rise to upholding of the appeal and the setting aside of the conviction. The grounds of appeal were crafted as follows:

"1.3 In convicting the appellant, the court a quo erred in making the following findings:

1.3.1 That the state proved the guilt of the appellant beyond a reasonable doubt;

1.3.2 That the warning statement of the appellant was admissible as evidence against him;

1.3.3 That the only reasonable inference that could be drawn from the money found with the appellant was his participation in the robbery;

1.3.4 Rejecting the appellant's version as not being reasonably possibly true."

[4] Both the state and the appellant were *ad idem* that the appeal should succeed and the conviction set aside. The appellant and two others were convicted on a charge of robbery with aggravating circumstances of a mazda motor vehicle and cash in the amount of R 49 000.00. The second charge was the pointing of a firearm and all three accused were acquitted on this charge. The court below found that the appellant's involvement in the commission of the crime was proven beyond reasonable doubt by: a) the discovery of the amount of R 710.00 which he handed over to the police and b) the contents of his voluntary admission which he made in his warning statement to inspector Ncangiso on 6 October 2000.

[5] A trial within a trial was held to determine the admissibility or otherwise of the appellant's statement to the police officer, inspector Ngcaniso. The court found that the state

had proven beyond reasonable doubt that the statement made to the inspector was made voluntarily and without compulsion and the contents were admissible as evidence against the appellant.

[6] Inspector Ncganiso testified that he took the appellant's warning statement and also explained his rights to him. The appellant responded positively to the questions posed to him and made the warning statement of his own free will, without being coerced. During re-examination and in response to questions from the bench surrounding the appellant's warning statement, the inspector stated the following:

"*Hof: Wat is die vrae, kan die getuie net vir die Hof sê wat is die vrae wat voorkom op bladsy 3, kom daar enige veduidelikings voor op bladsy 3 ----Ja.*

Wat is dit? – Hy het dit voorheen gesê, ek verkies om geen verklaring te maak op die stadium nie.

Aanklaer: Verskoning, ek gaan net die ondersoekbeampte daar stop edelagbare."

During cross-examination by Mr Johnson on behalf of the appellant, the inspector's responses are recorded as follows in the transcribed record on page 233:

Ek sien daar is geen melding daarvan dat hy, beskuldigde 2 aangedui het dat hy bereid is om te antwoord op vrae of enigsins so iets nie, stem u saam daarmee?---- Wat hy aangedui het?

Ja.--- Ja, dit is so. Want soos ek gesê het, hy het gesê hy wil geen verklaring maak nie. Maar ek het hom nog steeds vrae gevra wat hy geantwoord het.

Met ander woorde desnieteenstaande die feit dat hy gesê het hy verkies om geen verklaring te maak nie, het u nog steeds vrae gevra, nè?----- Dit is korrek".

[7] The investigating officer, inspector Motsoeneng testified that before the appellant made a warning statement to the police various police men questioned the appellant about the incident in the kombi and at the police offices. During the trial and under cross-examination the witness gave the following response on page 269:

"*En toe het u hulle beïnvloed deur te sê hulle sal lank tronk toe gaan as hulle nie saamwerk nie en toe gee hulle samwerking daarna. Dit is u weergawe in die borgaansoek, bevestig u dat?--- As ek mooi onthou het ek so gesê.*

Ja. U het hulle mos derhalwe beïnvloed dan om met u saam te werk en byvoorbeeld op u weergawe, uitwysings te doen. Ek praat van hulle in geheel, nie net een nie.---- Dit is nie om 'n persoon te beïnvloed of te dreig nie maar ek wys hom net dat hy moontlik gevangenis toe kan gaan as die goed gekry word.

Ek verwys u na bladsy 105 agbare van die rekord vanaf reël 4:

"Eers het hulle vir ons laat sukkel, maar na ons verduidelik het hulle sal nie borg kry nie, het hulle saamgewerk."

Wat beteken dit? Wat anders as onbehoorlike beïnvloeding is daardie sinnetjie wat ek nou net vir u gelees het? "Eers het hulle vir ons laat sukkel, maar na ons veduiduidelik het hulle sal nie borg kry nie, het hulle saamgewerk." Wat anders as onbehoorlike beïvloeding beteken daardie sinnetjie?---- Dit is wat ek gesê het dat as hulle maak dat die ondersoek dan stadig moet gaan en daar nie vordering is nie, dan sal ek moet gaan sê in die borgaansoek dat hulle nie borg moet kry nie."

[8] The appellant testified that he was assaulted at the time of his arrest and when he was forced to sign a statement that was already prepared by the police. The assault stopped when he signed the statement. On the day in question, 29 September 2000, he was at his brother-in-law's house where the latter conducted a tuck shop business. He slept in a room attached to the shop. The police found him there, assaulted him and informed him that he was being arrested for the robbery that took place at the factories. They said to him they wanted the money that was robbed from the factories.

[9] He informed the police that his remuneration or money he received from his brother-in-law was kept for him by Ngotwana, his co-worker at the shop. The reason for him being at his brother-in-law's place was that the shop was burgled. The money in the amount of R 710.00 was handed over to the police at Ngotwana's house, a few blocks away from the shop.

[10] It was submitted on behalf of the appellant that the appellant contested the warning statement from the beginning and the court *a quo* should have found that there was doubt regarding its voluntariness. The appellant had furthermore given a reasonable explanation for his possession of the amount of R 710.00 and the court should have accepted it as such.

[11] The state, in its submission, pointed out that page 3 of the appellant's warning statement (exhibit A) indicated that he did not want to make a statement to the police and that Exhibit B was taken after the appellant had indicated that he did not want to make a statement. This in itself violated the appellant's right of remaining silent.

[12] The state submitted further that the appellant had sufficiently explained where he got the R 710.00 from. The inference could therefore not be made that the money was from the robbery and there was no evidence whatsoever that the money could have been obtained from the robbery. There was no gainsaying evidence that the money was not received from the brother-in-law. For that reason, the state conceded that the conviction could not be supported and that the appeal against conviction should be upheld. I agree.

[13] Consequently, we made the order referred to in paragraph 1 of this judgment.

_____
C. VAN ZYL, J

I concur

_____
J.J. MHLAMBI, J

On behalf of appellant:	Adv. P. Nel Instructed by: Bloemfontein Justice Centre Bloemfontein
On behalf of appellant:	Adv. L Bontes Instructed by: Director Public Prosecutions Bloemfontein

/SR