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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NELSON SHEZI ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : KUMLEBEN, VAN DEN HEEVER JJA, VAN COLLER AJA

HEARD : 10 MARCH 1994

DELIVERED : 22 MARCH 1994

JUDGMENT

KUMLEBEN JA/....

The appellant was convicted in the Durban and Coast Local Division of the Supreme Court on three counts of murder and sentenced, taking these convictions as one, to twelve years imprisonment. With leave of the trial court, the correctness of the conviction is before us on appeal.

On the evening of 28 October 1990 the deceased, all young men, were running a tuck shop from a stationary van in the Kwa Mashu Township. They lived in an adjoining shack. At about 20h00 they were attacked by a band of six armed men wearing khaki uniforms. Some of them had firearms. Shots were fired and all three deceased died as a result of bullet wounds. This in brief was the evidence of the eyewitness Mr Bongani Mabaso.

After he had testified, counsel for the respondent intimated that the State would inter alia rely on a confession made by the appellant, and

recorded by a magistrate, to prove that he was a participant in the attack. Mr Luthuli, representing the appellant, contested its admissibility on the ground that the statement had not been voluntarily made. This led to an interposed enquiry (a so-called "trial-within-a-trial") at the conclusion of which the statement was ruled admissible. A "pointing out" exercise was also the subject of this enquiry but there is no need to refer to it in this judgment. In the course of the enquiry a State witness, Detective Sergeant Sibisi, said that after the arrest of the appellant he interviewed him. The appellant was given the customary warning, told that he was not obliged to say anything and the charges were read out and explained to him. He responded by making a statement and, when asked by Sibisi, said that he was prepared to repeat it before a magistrate.

It reads as follows:

"On Sunday 28 October 1990 myself, Hlela, Khoza and another Khoza left home for an Inkatha meeting at a place called Kwa Best. On our way to the meeting we called at Mbuso Ndlovu's place. When we arrived at Mbuso's place Hlela borrowed a firearm AK 47 from Mbuso Ndlovu. Thereafter we went to the meeting. We returned from the meeting. We went home. Whilst we were in the house at Kwa Mashu Mens hostel David Magwaza came. He spoke to Hlela. David Magwaza said we should go to the shack. Myself, Nhlanhla Shandu, Dumisani Mdletshe and David Magwaza went to the shack. When we arrived at this dwelling shack David Magwaza had an AK 47 rifle. Nhlanhla carried a knife. Mdletshe carried a stick. I carried a home made firearm. David fired a shot inside the shack. There were people inside. I also fired a shot. The people who were in the shack were members of the Comrades. David shot two people with the AK 47 rifle. One person was injured. I fired at a person with the home made firearm but did not hit this person. When David fired the bullet struck my left ankle."

After this confession had been received in evidence the State closed its case. The defence did likewise without adducing any evidence. Any involvement of the appellant in the perpetration of these offences was thus based upon his confession: no other

evidence implicated him.

In the course of his address to the court on the merits before verdict, Mr Luthuli submitted that the confession, viewed in isolation, did not necessarily refer to the incident, the subject of the indictment, and that for this reason the case against the appellant had not been proved. Assuming this submission to be well-founded, the evidence of Sibisi at the enquiry, to which I have referred, if restated in the trial proper would have plainly cured any such lacuna. The court, mindful of the fact that the enquiry was a separate one solely concerned with the admissibility of the confession, considered it necessary or at least prudent to have such evidence on record in the trial itself: if not by way of an admission on the part of the defence, then by recalling the witness to repeat what he had already said. The proposal was put to defence counsel but no

admission was forthcoming. The court thereupon, in the exercise of its discretion in terms of s 167 of the Criminal Procedure Act 51 of 1977, recalled Sibisi. He furnished the necessary evidence. The cross-examination , if anything, confirmed what he had now twice stated. The convictions followed, based on the confession and an application of the doctrine of common purpose.

Mr Luthuli submitted on appeal that the court improperly exercised its discretion in recalling Sibisi at such a late stage in the proceedings and that the appellant was prejudiced thereby. Fundamental to this question, counsel conceded, is whether such evidence was at all necessary to sustain the State case.

As a matter of course on arrest the appellant would have been informed of the reason therefor. Thus knowledge of the nature of the charge

would have preceded and related to his decision to confess. It is fanciful to suggest that he might have confessed to a crime without knowledge of the reason for his arrest. It is even more far-fetched to conclude that having being arrested for and told of crime A, he would have confessed to crime B. Furthermore, a comparison of the State evidence with the contents of the confession reveals significant points of coincidence. Ballistic evidence proved that an AK 47 automatic rifle was used in the attack and that some of the shots could have been discharged from a home made firearm. The locality of the confessed criminal conduct corresponds with the evidence of Mabaso in this regard. In the appellant's statement in terms of s 115 of the Act he admitted that on 28 October, the day on which these offences were committed, he was at the Men's Hostel in Kwa Mashu, which was clearly a reference to the

men's hostel referred to in the summary of substantial facts. The appellant further admitted, in terms of s 220 of the Act, that the AK 47 automatic rifle was found in the possession of one Hlela and that it was used in the commission of the crimes charged. In the confession the appellant states that he was inter alios with Hlela, who was in possession of such a weapon on the day in question. Thus, although the court acted with prudence in recalling Sibisi - and one might with hindsight say overcautiously - there was in fact no need to do so.

I must, however, add that I have no doubt that, had it been necessary for direct evidence of such nature to be on record, the decision to recall Sibisi in the circumstances could not be faulted. Section 167 of the Act confers a wide discretion on the court to recall a witness "at any stage in the criminal proceedings". The evidence in question

given by Sibisi at the enquiry was inherently formal, concise and, as one would have expected, uncontroversial.

In granting leave to appeal, the trial judge (Hurt J) concluded by saying:

> "Ms Ebrahim [counsel for the State at the trial] has very properly conceded that the whole question of encapsulation of evidence in cases where the admission of a confession is involved, is one which gives rise to difficulty and since that is an aspect which pertains to this particular case, I feel that the applicant should be granted leave to appeal to the Appellate Division."

Any problem relating to the "encapsulation of evidence" - as I see the matter - would only arise if the two issues discussed above had been decided in favour of the appellant (ie: that it was necessary to rely on that evidence of Sibisi for the conviction and that the court was wrong in recalling him) and if the respondent then chose to contend that this

evidence of Sibisi given at the enquiry could in any event be taken into account to secure a conviction. The problem is thus a hypothetical one but in the light of what was said in granting leave to appeal it is perhaps appropriate to comment briefly in this regard.

An accused person has the right to have the question of the admissibility of a confession tried as a separate and distinct issue. Hence the fact that the evidence at the enquiry cannot be relied upon in reference to the ultimate verdict. This has been stressed in at least two decisions of this court: S v De Vries 1989(1) SA 228(A) 233 and S v Sithebe 1992(1) S.A.C.R. 347. Both were concerned with evidence adduced at the inquiry and whether such can be taken into account in the trial proper. In the former decision at 233H Nicholas AJA said:

"It is accordingly essential that the issue of

> voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial."

This was confirmed (per Nienaber JA) in the latter decision in these terms at 351a - b:

> "The principle which it [the De Vries case] exemplifies is that an accused must be at liberty to challenge the admissibility of an incriminating document at a trial within the trial without fear of inhibiting his election at the end of the day - irrespective of whether the document is admitted or not - of not testifying on the issue of his alleged guilt. Unless the trial within the trial is treated as a watertight compartment, with no spill-over into the main trial, that danger will always exist: for if an accused person's evidence in the trial within the trial can legitimately be held against him in the main trial, he might be obliged to testify again in order to regain lost ground; and if the evidence of a State witness, where the merits are at stake, can simply be transplanted into the main trial, the accused might be obliged not only to cross-examine fully on all such issues (lest he lose the opportunity of doing so later) but to testify himself in order to neutralise its effect. In principle, unless the parties stipulate to that effect, neither the evidence of the accused nor of State witnesses given during the trial within the

trial, ought therefore to be injected into the main trial."

Thus the inquiry and the trial are to be separate in substance as well as form and the former is to be restricted to evidence relating to the admissibility of the confession.

In the result the appeal is dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

VAN DEN HEEVER JA
VAN COLLER AJA - Concur