IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Case No.42/2014

In the matter between:

PHINDA ELMON MAVUSO **Appellant**

vs

REX **Respondent**

Neutral citation: *Phinda Elmon Mavuso v Rex (42/2014) [2015] SZSC 10 (29 July 2015)*

Coram: **S.B. MAPHALALA AJA, M.D. MAMBA AJA and S.A. NKOSI AJA**

Heard: 16 July 2015

Delivered: 29 July 2015

[1] Criminal Law – accused, who is legally represented by Counsel, pleading guilty to unlawful possession of fire-arm and ammunition. However, evidence led by the Crown establishing that the accused was actually not in possession of such items. Conviction and sentence of appellant thereon set aside.

[2] Practice and Procedure – cogency of evidence – treatment of and approach to expert evidence. Expert required to state the facts or underlying circumstances upon which his conclusion is based, failing which very little weight to be attached to his evidence.

[3] Law of Evidence – admissibility of evidence – confession made to a police officer in the course of investigation, inadmissible unless reduced to writing and confirmed before a Magistrate or justice of the peace, as per the first proviso to section 226 (1) of Act 67 of 1938.

JUDGEMENT

MAMBA AJA

[1] The Appellant, who was represented in the Court a quo, was charged, convicted and sentenced to a total of 27 years of imprisonment. In all he faced three charges. The first count alleged a crime of murder which was committed on 9 September, 2011 at Vusweni area. On the second count he was charged for being found in unlawful possession of a firearm in contravention of section 11(1) of the Arms and Ammunitions Act 24 of 1964 (as amended) , whilst on the third count he was charged with a contravention of section 11 (2) of the said Act. The second and third counts were allegedly committed on 17 September, 2011, also at Vusweni.

[2] On arraignment he pleaded not guilty to count 1 and guilty to the other two crimes.

[3] At the close of the crown case he elected to remain silent and offered no evidence in his defence. He was eventually found guilty on all three counts. On the murder charge he was sentenced to a term of 20 years of imprisonment. This was after the court found that there were extenuating circumstance in connection with the commission of the offence. He was sentenced to a term of seven years of imprisonment for the unlawful possession of a firearm and two years for the unlawful possession of ammunition. The sentences in counts 2 and 3 were ordered to run concurrently with the sentence on the first count.

[4] The judgment of the court below records that the applicant was represented by Mr Sabela Dlamini during the trial. This is a typing error. He was actually represented by Mr Sabelo C. Dlamini.

[5] The evidence led by the crown in support of its case against the appellant was largely circumstantial.

[6] There was no issue about the identity of the deceased and the cause of his death and thus the post mortem examination report was handed in

evidence by consent. The police pathologist Dr R.M. Reddy who conducted the post-mortem examination on 15 September 2011came to the conclusion that the cause of death was 'due to fire-arm injury which involved the left lung, heart, liver and vertebra.' On dissection of the body of the deceased a bullet was found lodged therein. This was handed over to police officer 2974 of Lobamba Police Station. I shall return to this evidence later in this judgement.

[7] It is significant to observe that the police officer who was first at the scene where the body of the deceased was found, was unable to find any spent or empty bullet cartridge there. This was despite a search being made or conducted by him.

[8] It would appear that the circumstances surrounding the death of the deceased Spanela Mavuso, started with the mysterious disappearance of a child in one of the Mavuso families at Vusweni area. Rumours began circulating in the area that the child had been secretly taken by Spanela to a traditional healer. It was rumoured further that Spanela had also offered to redeem or rescue the child from the traditional healer upon him being paid a sum of E3,000-00.

[9] PW4 Ncamiso Celumusa Dlamini testified that sometime in September 2011, the appellant had given him his 9mm firearm which was silver in colour and had a black butt. When giving him the firearm, the appellant told this witness that he had accidentally killed the deceased. He told him to keep the fire-arm for him. There were 5 rounds of ammunition in the fire-arm.

[10] After the appellant was arrested, PW4 then handed over the firearm to Nhlanhla Lucky Masilela, a friend of the appellant. The appellant was arrested by 4528 Detective Constable Wonder Maseko on 17 September 2011. Nhlanhla gave evidence as PW5 whilst Constable Maseko testified as PW8.

[11] It is common cause that after his arrest, the appellant led the police to PW4 (Ncamiso) who in turn led the police to PW5 (Nhlanhla Masilela) from whom the fire-arm was obtained or found by the police. I now pause on the narrative and analyse this evidence pertaining to the fire-arm.

[12] Section 11 (1) and (2) of the Arms and Ammunition Act 24 of 1964 (as amended) provides that:

"11. (1) No person shall be in possession of a firearm or arms of war unless he is the holder of a current licence to possess it or is otherwise permitted to possess it under this Act.

(2) No person shall be in possession of ammunition unless he is the holder of a current permit or licence to possess the firearm for which such ammunition is intended, or is otherwise permitted to possess such ammunition under this Act."

From the above, it is clear that the elements of the offence are that the accused must be (a) in possession of

(b) a fire-arm and

(c) have the requisite intent (mens rea) to do so. Possession includes custody, ie the physical control of the fire-arm. See **R v Kimera, 1982-1986 (1) SLR 125 and George M. Msibi V R 1982-1986 (2) SLR 479**.

> 'For these purposes the Act defines possession as including custody. In the result then the prosecution must establish that the accused had a physical control of the arm and either the intention to possess the arm for his own benefit (which constitutes possession) or, alternatively, an intention to keep or guard the arm for the benefit of another person (which constitutes custody). Most of the difficulties in establishing custody for these purposes have

centred around the precise degree of control which the accused must be shown to have exercised' (**South African Criminal Law and Procedure Vol III, 1971 ed by J.R.L Milton and N.M. Fuller at page 167.**

[13] In the instant case, the fire-arm and ammunition were found not in the possession of the appellant but instead that of PW5 – Lucky Masilela. In fact, what is clear is that at the relevant time, the appellant did not know that the fire-arm and ammunition had been transferred by PW4 to PW5. Plainly therefore, it cannot even be said that PW4 was at the time holding these items on behalf of the appellant. Whilst he, the reputed owner of these items may have had the relevant *mens rea* or intention to possess these, he certainly did not have the physical control thereof.

[14] The fact that the appellant, who was represented by Counsel in this case, pleaded guilty to these two offences, did not, in my judgment, make him guilty thereof. The evidence proved otherwise. Section 5 (1) of Act 74 of 1954 empowers this Court to overturn a conviction if this Court thinks that the conviction should be set aside on the ground that it is "…cannot be supported having regard to the evidence. This is such a case in my judgment. Therefore, notwithstanding his plea, he should not have been found guilty of these offences. His conviction and sentence on counts 2

and 3 stand to be set aside. I would therefore uphold his appeal on these counts. He is accordingly acquitted and discharged thereon.

[15] In his evidence in chief PW4 informed the Court that the appellant had informed him that he had accidentally killed the deceased. However, under cross examination he stated that he, together with PW5, had been arrested, and threatened by the police to say that the appellant had admitted having killed the deceased. He stated as follows:-

> 'As I said before Court, my Lord, the Police threatened to arrest us if we did not say it was the accused who killed the deceased.' (Page 41 lines 23-24 of the record of Proceedings).

This prompted the trial judge to say later:

> 'Anyway Counsel, you can proceed, but I am having a problem with the witness because that is exactly what he said he was told by the accused in his evidence in chief. So I am seeing a witness who is moving away from his evidence in chief.' (Page 44 line 14-17).

Again PW4 emphasised that

> 'No my Lord. My Lord what I am saying is that the accused gave me his gun to keep, the police came and arrested me and said I should say it is the accused that killed the deceased.' (Page 45 lines 24-26).

[16] From the above evidence of PW4 in relation to the charge of murder, it is clear to me that it can not be reliably said that the appellant told PW4 that he, the appellant, had accidentally shot and killed the deceased. Therefore, the court a quo was in serious error when it found as a fact that 'the accused told him that he had shot the deceased using the pistol.' (See paragraph 6 of the judgment). Similarly, the learned trial judge was in error in holding that PW4 was trying to exonerate the appellant in this regard as there was no motivation or justification for coming to this conclusion.

[17] According to PW6, 3345 Sgt V. Mbingo, who was introduced as a ballistics expert, on 7 December 2011, he received the relevant pistol and live rounds of ammunition and a fired bullet marked SWAG 050328. This is the same bullet that was found lodged in the soft tissues of the body of the deceased during the post-mortem examination. PW6 stated that:

> 'I then took the fired bullet exhibit and went for my microscope for comparison. I compared my tests, that I fired with the pistol I received, with the exhibit fired bullet I received. I found that the fired bullet exhibit that I received, matches the tests that I fired with the pistol that I also received. …My final conclusion was that,

that pistol was a pistol that was working, …The fired bullet was fired by the pistol which I also received.'

In short, PW6 testified that the bullet found in the body of the deceased was fired from the pistol recovered from Nhlanhla Lucky Masilela (PW5).

[18] Significantly though, PW6 did not make or provide any microscopic photographs depicting what he had observed under the microscope or what he was actually referring to. He merely produced and handed to court the bullet exhibit and test bullet (he had actually fired from the relevant firearm). This is, in my judgement woefully deficient. He had to make and submit to court photographs of both the bullets he was comparing and show, graphically what he was talking about. He had to show to court whatever similarities he had seen. It was these similarities in the two fired bullets that convinced him that indeed the two bullets were fired from the same firearm. He did not do so. His mere say so, was in my judgement insufficient evidence to support the conclusion he wanted the court to believe. Indeed, his testimony in this regard was just a conclusion with no supporting evidence. It cannot be relied upon.

[19] It is trite law that a court of law is not always bound to accept the evidence of an expert. Sufficient material must be presented to the court

in support of the conclusions reached by the expert, before a court may accept and rely on such evidence and conclusions. In the instant case, the witness did not, for example, refer to any striations – those linear marks that are the signature marks by every fire-arm on every bullet or projectile discharged by it - on then examined bullets which would have established any similarities to lead him to the conclusion that both bullets were fired from the same gun. He referred to no points of resemblance or the minimum of such points that are needed to establish identity.

[20] *S v Mkhize and Others 1999 (1) SACR 256*, is a case in point herein. There the headnote reads in part:

> 'One of the expert witnesses was not able to provide reasons for the opinions which he expressed and conceded that he had not taken any photographs of the exhibits of which a positive identification had been made. In the absence of such photographs or of the original exhibits, the court was unable to properly consider those features upon which the witness relied in support of his positive findings.'

At page 263b-64a Boruchowitz J said:

> Before evaluating the opinions and findings expressed by inspector Nkuna, it is necessary to say something concerning the basis upon which expert evidence is received in cases such as the present. The

use of a comparison microscope for comparing exhibits is a technique which is well known and considered to be reliable. The need to receive expert evidence arises from the fact that the Court, by reason of its lack of special knowledge and skill, is incapable of drawing properly reasoned inferences from the various images which are to be seen under the microscope. Because of the specialised nature of the investigation the Court, with its untrained eye, is hardly in a position to itself, from its own observations, draw any conclusions and is thus dependent upon the opinion of skilled witnesses such as forensic ballistic specialists.

In my view the approach to be adopted when evaluating ballistic evidence appears to be similar to that adopted by the courts in relation to fingerprint evidence. See in this regard *R v Morela* 1947 (3) SA 147 (A) where Tindall JA, after referring to previous decisions in respect of such matters, said the following at 153:

> "…If these decisions were intended to lay down a general rule that the court will not accept an expert's opinion unless he can demonstrate the points of similarity in such a manner as to enable it to understand them sufficiently to form its own opinion on them, then I disagree. Of course a court should not blindly accept and act on the evidence of an expert witness. It is necessary to get the expert on

> fingerprints to explain as clearly as possible the nature of the similarities; and as a result of his interrogation or for other satisfactory reasons the court may not be prepared to act on his testimony. There may, for instance be conflicting evidence by two fingerprint experts called on opposite sides, in which case the court will have to decide whether it can safely act on the evidence of the expert called by the Crown. But the court or the jury in, cases of the present kind, has not the special training to enable it to act on its own opinion; it really decides whether it can safely accept the expert's opinion."

See also *R v Smit* 1952 (3) SA 447 (A) at 451A-F.

In R v Nksatlala 1960 (3) SA 543 (A) Schreiner JA at 546 C-E described the approach to be adopted in evaluating fingerprint evidence in this way:

> "That is not of great importance since in relation to fingerprint evidence the court is not obliged to form its own opinion, instructed by the expert, as to the identity of the prints (R v Morela 1947 (3) SA 147 (A); R v Smit 1952 (3) SA 447 (A)). It is right to recall the remarks of Tindall JA in the former case quoted by Fagan JA in the latter that a court should not blindly accept and act upon the evidence of an

> expert witness, even a fingerprint expert, must decide for itself whether it can safely accept the expert's opinion. But once it is satisfied that it can so accept it, the court gives effect to that conclusion even if its own observation does not positively confirm it. Where, as here, there is only one fingerprint, where it does not appear to be an ideally clear one, and where the points of resemblance that are visible are near to the minimum in number, it is of the greatest importance that the expert evidence, whether it is that of one or more witnesses, should be closely scrutinised to eliminate as far as humanly possible all risk of error."

See also *R v Theunissen 1948 (4) SA 43 (K)* where De Villiers AJP declared:

> 'In my opinion, and that is borne out by authority, he could have deposed to the facts which he had found and upon which he relied as the foundation for the opinion, but an opinion, unaccompanied by the foundation on which it is based, is again of no value to the judicial officer who has to make a finding on it.'

[21] I think I should emphasise that there is no suggestion herein that the evidence of the expert witness is irrelevant and therefore inadmissible. Quite the contrary. The evidence is relevant and admissible. However,

because of the manner in which it has been tendered, proffered or presented, it has very little weight or probative value to the Court.

[22] From the above analysis of the evidence of the ballistics expert, it is plain to me that his evidence was so weak that it could not and should not have been relied upon. It simply lacked the veneer, quality or cogency or status of expert evidence. No reliance should have been accredited to or placed on it.

[23] But again, assuming that the evidence of PW6 could be relied upon, it did not prove that it was the appellant who shot and killed the deceased. PW4 was unable to state when he had received the firearm from the appellant, save that it was in September 2011. There is nothing in the evidence tendered by the crown that it was on or after the 9th day of September 2011; that being the day the deceased was killed. I am of course alive to the fact that PW8, Detective Constable Wonder Maseko baldly and unambiguously testified, when asked by the Learned Judge whether he had cautioned the appellant, that :

> 'Yes, I cautioned him, I continued telling him he was not obliged or forced to tell me anything, or forced to point out anything or lead me anywhere. The accused voluntarily led me to Celumusa Ncamiso Dlamini, where he said he was going to get the gun which

> he used to murder the deceased person, Spanela Jabulane Mavuso.'

This evidence is clearly inadmissible. It is a confession made to a policeman, investigating a case and clearly a person in authority over the appellant. Besides, it was not reduced into writing and confirmed before a judicial officer as dictated by section 226 (1) of the Criminal Procedure and Evidence Act 67 of 1938. The second proviso to that section states that:

> 'Provided further that if such confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a magistrate or any justice who is not a police officer …' See also July Petros Mhlongo and Others v R, (unreported) Criminal Appeal 185/92.

[24] The fact that the policeman stated that the information was voluntarily given by the appellant is irrelevant. It is the duty of the Court to determine whether the said statement was freely and voluntarily made by the maker thereof. Apart from that, there was really no inquiry conducted to determine the admissibility or otherwise of this piece of evidence. It thus remained inadmissible and could not be relied upon by the court.

(S v Maake 2001 (2) SACR 288 (W).

[25] There was also reliance on the evidence of PW9 Lomasontfo Khumalo who testified that the appellant had, after the disappearance of the child referred to above, stated that the deceased 'may die at any time.' (Pages 87 line 21 and page 89 line 20). Whilst this piece of evidence, taken together with the appellant's possession of the fire-arm at the relevant time may tend to lend suspicion against the appellant, this, even in the face of the silence of the appellant, cannot be said to be proof beyond any reasonable doubt that he killed the deceased. No such inference or conclusion could be reached based on this evidence.

[26] In *R v Blom 1939 AD 199* the court laid down the following rule in reasoning by inference and this rule has been consistently applied in this jurisdiction as well. In *Sean Blignaunt v R Crim Appeal 1/2003*, judgment delivered on 26 November 2004, Beck JA stated:

> 'It is trite that the cumulative effect of a number of incriminating probabilities may suffice to eliminate any reasonable possibility of innocence, even though each and every individual probability is on its own not strong enough to do so. But when reasoning by inferences drawn from circumstantial evidence the touchstone remains the two cardinal rules of logic enunciated in the leading case of *Rex v Blom 1939 AD 199*. Those two rules are that the

inference sought to be drawn must be consistent with all the proved facts; if it is inconsistent with any one proved fact it cannot be drawn. And the second rule is that it must be the only inference that can be drawn from the proved facts; if another one or more reasonably possible inferences can be drawn from those facts one cannot know which is the correct inference to be drawn.'

[27] In the present case, there is no suggestion that the appellant told Lomasontfo that he, the appellant, would kill the deceased. He could have been predicting that Mavuso's death was imminent because of the anger and suspicion held by the community that the deceased was somehow involved in the disappearance of the child in question. Again, it is not the only reasonable inference that because he was once in possession of the firearm sometime in September 2011, he is the one who killed the deceased. PW4 for example, cannot reasonably be eliminated or excluded.

[28] For the foregoing reasons, the appeal is allowed in its entirety and the conviction and sentences imposed on the appellant are set aside. He is acquitted and discharged of the offences herein.

[29] In fairness to Counsel for the Crown, he did not seriously support the conviction of the appellant; rightly so in my judgment.

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M.D. MAMBA AJA

I agree.

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S.B. MAPHALALA AJA

I also agree.

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S.A. NKOSI AJA