REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(KWAZULU-NATAL, PIETERMARITZBURG)

APPEAL NO. AR 437/2008

In the matter between:

MLUNGISI SHEZI — First Appellant
VUSI PETROS JILA — Second Appellant

and

THE STATE — Respondent

JUDGMENT (Delivered on 12 March 2009)

GORVEN J

[1] On 8 September 2004 at just after 19h00, Morganathan Chetty was driving a red Mazda 323 in Mountain Rise, Pietermaritzburg. He drew up at a traffic light behind another vehicle. A green Opel Kadett was parked alongside with flashing hazard lights. Two men emerged from this vehicle. One approached his open driver's window and pointed what he described as a silver firearm at him. He did not notice their faces because he was in a state of shock. He was told to get out of the Mazda. He did so as fast as he could and fled directly to the Mountain Rise police station which was some 250 metres away. At the police station, a radio alert was put out with the description of the vehicle. Within an hour it was reported to him by the police that the vehicle had been recovered. He identified the vehicle the following day and identified a radio/CD player as having been in the vehicle at the time.

[2] Two members of the South African Police Service were on duty at the time. They were parked in a car on the N3 southbound between the Lion Park and the Umlaas Road turnoff. They received a radio report about the hijacking and approximately 15 minutes thereafter noticed a red Mazda 323 with the given registration number driving past on the southbound carriageway. They each noticed two persons inside. After confirming the details of the vehicle with radio control they turned on their blue light and siren in order to signal that the vehicle should stop. It had the opposite effect. The Mazda increased its speed, swerved between lanes of traffic, dodged the police vehicle and made to force it from the road when it attempted to draw alongside. It then made a sudden swerve from the right hand lane to exit at the Camperdown off-ramp. During the chase on the N3, the passenger in the police vehicle, Constable Rencken, fired two shots at the tyres of the Mazda. The police vehicle followed and the Mazda then spun out at the T-junction while attempting to turn towards Camperdown and came to a halt.

[3] The police vehicle stopped 3 metres in front of the side of the Mazda with its lights on bright. The two police officers noticed the driver holding what appeared to be a silver firearm in his right hand as he gripped the steering wheel. The two occupants of the Mazda emerged from the vehicle and ran away in different directions. The two policemen each chased one of the occupants. Both shouted to them to stop, both fired more than one warning shot and both then fired at the fleeing occupants which wounded them and caused them to stop. The two occupants were the only people in the area and remained within the sight of the chasing police officers. They turned out to be the first and second appellants with the second appellant having been the driver. The first appellant was wounded in his buttock and the second appellant in his leg.

[4] Inspector Wolfaard, who had chased the first appellant, found a cellphone on the first appellant. A sharpened allen key was found by him in the underpants of the first appellant and was recognised by him as an instrument commonly used to steal vehicles. Constable Rencken found a gate remote and a bunch of keys in the possession of the second appellant. When the police officers caught up with them, each was warned of his rights and arrested. On their return to the Mazda, the police officers found the radio/CD player lying on the passenger seat with CDs also lying on the floor. Inspector Wolfaard also found a replica silver toy pistol lying on the floor of the Mazda by the driver's feet which resembled what he had seen in the driver's right hand.

[5] The appellants were each charged with one count of Robbery with aggravating circumstances. The second appellant was, in addition, charged with contravening the provisions of section 63(1) read with sections 1, 63(2), 63(3), 69.73, 89(1) and 89(5) of the National Road Traffic Act, No. 93 of 1996 in driving the red Mazda recklessly or negligently with the alternative charge of driving without reasonable consideration for other road users.

[6] The charge sheet mentioned the provisions of Section 51 (2) and (3) of the Criminal Law Amendment Act, No 105 of 1997 in relation to the robbery charge. The appellants were represented during the trial. They each pleaded not guilty and elected not to disclose the basis of their defence. The provisions relating to minimum sentences were explained to them by the magistrate. They were both convicted of robbery with aggravating circumstances. The second appellant was also convicted of reckless driving. The first appellant was sentenced to imprisonment for a period of 10

years. The second appellant was sentenced to a period of imprisonment of 12 years on the robbery charge and a period of 1 year on the reckless driving charge, the latter to run concurrently with the former. Both were declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act, No. 60 of 2000.

[7] The version of the State was correctly accepted. That of the appellants, to the effect that they were waiting for a bus along with many other pedestrians and fled when they heard gunshots from a vehicle chase and were wrongly thought to be the people from the Mazda, was correctly rejected by the magistrate as being false beyond reasonable doubt. The magistrate dealt fully with the reasons why this was so and I do not intend to repeat them. It is also clear that, despite the fact that the State proved only that a replica firearm was used, the appropriate conviction was for robbery with aggravating circumstances since there was a threat to inflict grievous bodily harm which meets the definition in section 1 of the Criminal Procedure Act (S v Loate & Others 1962 (1) SA 312 (A) at 320 C-D). However, in convicting them of robbery with aggravating circumstances, the magistrate took into account one factor which I now deal with.

[8] After Inspector Wolfaard had given evidence of the arrest of the first appellant and of finding the cellphone and sharpened allen key, the following exchange took place:

> PROSECUTOR Did accused 1 indicate as to why he was running away from you? --- I questioned accused 1 Your Worship. After informing him of his rights, he made a report to me.
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> COURT You questioned accused 1? --- That's correct Your Worship, accused 1.

PROSECUTOR Yes? --- Your Worship, I don't know if I can say what the accused told me.

Your can tell the Court. ---Your Worship, he informed me that they have just hijacked this vehicle from a(n) Indian male in Pietermaritzburg, Mountain Rise. He also informed me Your Worship, that…(intervention).

Stop, before you go any further. Your Worship, it appears that this witness is bringing out a confession.

COURT Yes.

PROSECUTOR I don't know if the defence will object to this witness continuing in this line.

MR RAMCHARRAN Your Worship, no objection.

PROSECUTOR Okay you can proceed. --- Your Worship, he also informed me that accused 2 was driving the vehicle, that he was not driving the vehicle. He also informed me that he did not possess a firearm himself and he also informed me that … (intervention).

Sorry … (inaudible) (SPEAKING OFF-MICROPHONE).

COURT What language did he speak? --- English Your Worship.

PROSECUTOR Yes? --- He also informed me that a third person – they were dropped off by a third person with a green vehicle, came to Pietermaritzburg, dropped them off when they hijacked the vehicle.

[9] A number of issues arise from this exchange. First, does what the first appellant said amount to a confession? Secondly, if it does, should it have been received in evidence? Thirdly, if not, what is the effect of the magistrate having so received it?

[10] It is trite law that a confession is 'an unequivocal acknowledgment of... guilt, the equivalent of a plea of guilty before a court of law'.[1] It must therefore cover all the elements of the offence with which an accused person is charged and exclude

[1] R v Becker 1929 AD 167 at 171

possible defences.[2] The fact that an accused had an exculpatory purpose in making the statement is irrelevant in construing whether it amounts to a confession. It must be objectively construed.[3]

[11] When the first appellant spoke of having "hijacked the vehicle" and that they had been "dropped off when they hijacked the vehicle", can it be said that he admitted all the elements of the offence with which he was charged? What he meant by the term "hijacked" was never explored but the context shows that he meant a deprivation of another's property by threat of force. Given the context of the confession, and in particular with the first appellant having disavowed that he personally had a firearm, I am of the view that what he said amounted to a confession.

[12] The next question is whether this confession should have been admitted by the magistrate in evidence. The point of departure is Section 217 of the Criminal Procedure Act, No. 51 of 1977. This provides, in its material parts, as follows:

> (1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided-
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> (a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that

[2] S v Yende 1987 (3) SA 367 (A) at 372 D-E
[3] S v Msweli 1980 (3) SA 1161 (D) at 1162 G-H; S v Yende (supra) at 374 C-D

section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice…

(3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him-

(a) if he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and

(b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.

[13] The present confession was clearly made to a peace officer other than a magistrate or justice. To be admissible it would, therefore, in terms of this section, need to be confirmed and reduced to writing in the presence of a magistrate or justice. This was not done. It follows that it does not comply with the provisions of section 217(1) and would not ordinarily be admissible. But, when the prosecutor quite properly stopped the witness from testifying to the confession, the legal representative of the first appellant indicated that he did not object to the evidence being led. He confined his attack on the confession to a denial that any such thing was said to Inspector Wolfaard. This gives rise to the question whether the consent of the legal representative to the leading of evidence of an otherwise inadmissible confession renders the confession admissible.

[14] The general principle was set out in *R v Perkins*.[4] Here, evidence of a confession made by the accused to a detective was elicited in re-examination. It was allowed by the judge of first instance because evidence of the conversation of which the confession formed a part was elicited by the accused in cross-examination. The

[4] 1920 AD 307

judge considered that 'the defence, by introducing the statement by means of cross-examination, had forfeited the right to have such statement excluded' but reserved this point as one of two questions of law for decision by the Appellate Division. Innes CJ dealt with this approach as follows:

> The Court applied the rule that a party may be held to have waived his right to object to evidence, which he has himself opened. That of course is founded on the principle that a litigant thus acting is regarded as having consented to the admission of evidence, to which he would otherwise have been entitled to object. But I do not think that this rule, applicable as it is in civil proceedings, can be allowed to operate in a case like the present. The terms of the statute are peremptory, - a confession made to a peace officer, other than a magistrate or Justice "shall not be admissible in evidence under this section" unless confirmed and reduced to writing as prescribed. Such confession, the Legislature in its wisdom has decreed, shall not be evidence at all, and an accused cannot by his consent remedy the defect.[5]

[15] The section in *Perkins's* case was couched in prohibitive terms. Although the present section is couched in permissive terms, providing a confession was made freely and voluntarily, the import of *Perkins's* case remains clear and binding. Of course, since then, section 217(3) was enacted and provides for such a confession to be admissible in two instances. Neither of these applies to the present matter. The confession should therefore have been ruled inadmissible by the magistrate and excluded from the record.

[16] What, then, is the effect of the magistrate having received it in evidence? It was clearly an irregularity. However, no special entry was applied for or made in

[5] at p310

terms of section 318 of the Criminal Procedure Act. The case has come before us on appeal. The leave to appeal was limited by the magistrate to an appeal against sentence. I am of the view that section 322 of the Criminal Procedure Act specifically allows it to be dealt with in the present circumstances. This section gives an appeal court a wide discretion to deal with a possible failure of justice, providing as follows:

> (1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may-
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> (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
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> (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
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> (c) make such other order as justice may require:
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> Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

The court's general powers of review in terms of section 304(4) of the Criminal Procedure Act would also entitle this court to deal with the matter. I am therefore disposed to deal with the matter despite leave to appeal not having been granted and in the absence of a special entry.

[17] The question whether inadmissible evidence arising from the consent of, or absence of objection by, counsel for an accused can be attacked on appeal was

answered in the affirmative in *R v Noorbhai*.[6] In this case it was held that such consent 'is a matter very seriously to be taken into account when this Court is considering the question whether the irregularity complained of is in itself of such a nature as to be capable of having adversely influenced the jury's verdict…'

[18] What test should then be utilised on appeal? Does the failure to exclude the confession vitiate the proceedings? In *S v Gcaba*[7], Harcourt J, sitting as a judge of first instance with two assessors, considered what should take place when inadmissible evidence of a confession was led before him and the assessors. As in the present matter the evidence came as "a considerable surprise" to the prosecuting counsel who indicated that he had no forewarning that this evidence would be led by the investigating officer. It was held, on the facts of that case, that the trial could not continue before the court as it was constituted and the proceedings were quashed. In arriving at this decision, however, Harcourt J found that the content of the confession in that matter was destructive of the defence outlined in cross-examination relating to where the accused had obtained the knife utilised in the offence. This distinguishes it from the present matter. It is also distinguishable on the basis that in the present matter the magistrate did not quash the charges but proceeded with the trial.

[19] A more comparable situation to the present one is found in the case of *S v Gaba*.[8] Here the trial court had heard evidence of the contents of the confession before disposing of the trial within a trial relating to a contested confession. Dealing with this situation Viljoen JA said the following:

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[6] 1945 AD 58 at 67. See also *R v du Preez* 1943 AD 562 at 580.
[7] 1965 (4) SA 325 (N)
[8] 1985 (4) SA 734 (A)

> To sum up, therefore, I consider that the learned Judge prematurely and irregularly received evidence of the contents of the confession; and that such irregularity entailed at least potential prejudice for the appellant. But potential prejudice is not enough for success on appeal. The final question to be decided in this regard is not whether the learned trial Judge committed an irregularity which might have led to a failure of justice; it is whether a failure of justice has in fact resulted from the learned Judge's ruling. See s 322 (1) (a) of the Criminal Procedure Act 51 of 1977. The test is whether the appellant was prejudiced. See *R v Sassin* 1919 AD 485 at 487; *R v Rose* 1937 AD 467 at 475 - 477.[9]

[20] *Gaba's* case was decided before the coming into effect of the Constitution of the Republic of South Africa Act, No. 200 of 1993 (the Interim Constitution) and the Constitution of the Republic of South Africa, 1996 (the Constitution). The effect of the interim Constitution and the Constitution on the approach of the courts prior to its coming into effect must therefore be considered. In *S v Zuma and Others*[10], Kentridge AJ dealt with the provisions of the interim Constitution. He said:

> The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A) , the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire
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> > 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.
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> A Court of appeal, it was said (at 377),

[9] at p750.
[10] 1995 (2) SA 642 (CC)

> 'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'
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> That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.[11]

This reasoning has equal application to the Constitution despite the different wording in the relevant section.

[21] In *S v Felthun*[12], Vivier JA referred to two possible results which may arise from irregularities in a trial:

> As to the question whether there has been a failure of justice, this Court has in a number of decisions recognised that in an exceptional case the irregularity may be of such a kind that it per se results in a failure of justice vitiating the proceedings, as in S v Moodie 1961 (4) SA 752 (A) and S v Mushimba en Andere 1977 (2) SA 829 (A). Where the irregularity is not of such a nature that it per se results in a failure of justice, the test to be applied to determine whether there has been a failure of justice is simply whether the Court hearing the appeal considers, on the evidence (and credibility findings, if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there was no resultant failure of justice (per Holmes JA in *S v Tuge* 1966 (4) SA 565 (A) at 568F - G; and see also *S v Xaba* (supra at 736A - B) and *S v Nkata and Others* 1990 (4) SA 250 (A) at 257E - F).

[11] at para [15].
[12] 1999 (1) SACR 481 (SCA) at p485i – 486b

[22] The test was somewhat more broadly applied in *S v Molimi*[13] where Nkabinde J said:

> Having concluded that the evidence of the confession and hearsay remains inadmissible against the applicant, the question remains whether his conviction ought to be upheld on the remaining admissible evidence…

[23] *Molimi's* case does not set out the principles to be applied nor does it contradict those laid down in *Felthun's* case. It is my respectful view that the use of the phrase "unaffected by the irregularity or defect" is preferable to an approach which simply excises the inadmissible confession and assesses the remaining admissible evidence. This is because the remaining admissible evidence may be affected, and thus tainted, by the inadmissible evidence.

[24] In the present matter, the irregularity is not of the first kind referred to in *Felthun's* case, namely one which per se results in a failure of justice. This is due to the conclusive nature of the admissible evidence in the trial entirely unaffected by the confession. It is my view that, in the present matter, such evidence does amount to "a complete mosaic" which clearly justifies the conviction of the appellants. Given the fact that no evidence rested on the confession or was obtained as a result of it and the clear and incontrovertible chain of evidence linking the two appellants to the robbery, I cannot conceive that any failure of justice resulted from the irregular receipt of this evidence. In the event, the appeal against the conviction on the charge of robbery with aggravating circumstances must fail.

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[13] 2008 (3) SA 608 (CC) at para [51].

[25] Likewise, there would be no merit in any appeal of the second appellant against his conviction on the second charge faced by him alone. The State proved beyond reasonable doubt that he drove the red Mazda recklessly.

[26] As to sentence, the magistrate took into account the personal circumstances of the appellants, the nature of the offence and the interests of the community. He distinguished between the two appellants on the basis of the second appellant's previous conviction for theft committed in 2003. He did not impose the minimum sentences prescribed by Act 105 of 1997 on the charge of robbery with aggravating circumstances despite not specifying what he regarded as substantial and compelling circumstances. The magistrate did not misdirect himself in any respect. The sentences can hardly be said to be startlingly inappropriate, especially in the light of the minimum sentencing provisions which apply to the main charge. There is therefore no basis on which this court is at liberty to interfere with the sentence imposed. Even if there were such a basis, I would not have imposed any lesser sentences.

[27] In the result the appeal of each of the appellants against conviction and sentence is refused.

MARNEWICK AJ