THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 54/06

Not Reportable

In the matter between

SINAMISO SITHOLE **Appellant**

and

THE STATE **Respondent**

Coram**:** **HOWIE P, NAVSA JA, THERON AJA**

Heard: 15 SEPTEMBER 2006
Delivered: 28 SEPTEMBER 2006

Summary: Evidence – contradictions in the evidence of witnesses not sufficiently material to justify rejection of the state's version.

Neutral citation: This case may be cited as Sithole v The State [2006] SCA 126 (RSA)

JUDGMENT

THERON AJA

[1] The appellant was convicted in the Balfour Regional Court of the unlawful possession of an R6 rifle and 23 rounds of ammunition in contravention of ss 2 and 36, read with ss 1, 12, 39 and 40 of the Arms and Ammunition Act 75 of 1969, and sentenced to an effective term of imprisonment of four years. The appellant's appeal against his convictions to the Transvaal Provincial Division was dismissed (Preller J, Ismail J concurring). This is a further appeal against both convictions, with the leave of the High Court.

[2] The issue in this appeal is whether the contradictions in the evidence of the state witnesses were material, warranting a rejection of the state's version of events.

[3] The case for the state rests on the evidence of three witnesses, namely, Inspector Mhlambi and reservist Constables Miya and Twala, all members of the South African Police Service. A summary of the cumulative evidence of these witnesses is set out in the following two paragraphs.

[4] On the morning of 11 June 2002, Miya and Twala were on duty in the vicinity of the post office in Greylingstad. The post office is a designated pension paypoint and pension payments were to be made that day. Miya and Twala were alive to the dangers associated with pension payouts and their brief was to secure the area.

[5] The appellant and others arrived on the scene in a red Volkswagen Golf motor vehicle. The appellant's behaviour aroused the suspicions of both Miya and Twala. They reported their suspicions to the police station. In consequence, Mhlambi proceeded to the scene. Miya and Twala either pointed out or described the appellant to Mhlambi. (The evidence in this regard is not clear.) The appellant, unsuccessfully, attempted to flee from the scene and in the process discarded a black canvas bag which he had been carrying. It is common cause that the black bag, containing the firearm and ammunition forming the subject matter of the charges proffered against the appellant, was recovered from the scene.

[6] The appellant's version is that he had arranged to meet an associate in Greylingstad who had undertaken to convey him to Standerton. Soon after his arrival in Greylingstad he heard gun shots and in a state of panic ran for cover. The appellant suggested that in the resultant pandemonium of people

scurrying for shelter and shops hastily being closed, Mhlambi mistook him for the suspect who had earlier been identified by Miya and Twala. He denied knowledge of the black bag and its contents.

[7] It is trite that not every error made by a witness will affect his or her credibility. It is the duty of the trier of fact to weigh up and assess all contradictions, discrepancies and other defects in the evidence and, in the end, to decide whether on the totality of the evidence the state has proved the guilt of the accused beyond reasonable doubt. The trier of fact also has to take into account the circumstances under which the observations were made and the different vantage points of witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility of the witnesses.[1]

[8] I turn now to deal with the contradictions raised in support of the contention that the evidence of the state witnesses is untruthful and at the very least, unreliable. The first conflict relates to where the appellant was when Mhlambi arrived on the scene. According to Mhlambi the appellant was standing near a tree behind the post office, while Miya's evidence was that the appellant was seated on a railing along side the road and had at no

[1] *S v Sauls* 1981 (3) SA 172 (A) at 180E-F; *S v Oosthuizen* 1982 (3) SA 571 (T) at 576G-H; *S v Mkohle* 1990 (1) SACR 95 (A) at 98f-g; *S v Jochems* 1991 (1) SACR 208 (A) at 211g-j; *S v Mlonyeni* 1994 (2) SACR 255 (E) at 261c-d; *S v Bruiners* 1998 (2) SACR 432 (SE) at 439c-f; *S v Mafaladiso* 2003 (1) SACR 583 (SCA) at 593f-594h.

stage been near a tree. The trial court, in dealing with this conflict, was mindful of the fact that Mhlambi and Miya:

'nooit heel tyd op presies dieselfde plek was nie, so hulle waarnemings gaan verskillend van mekaar wees. Dit is menslikerwys te verwagte.'

It does not necessarily follow that Mhlambi or Miya or both must be untruthful or unreliable simply because there are differences in their observations.[2] This is the kind of discrepancy to be expected from two eyewitnesses who are recounting the events from their respective viewpoints; their observations were made in tense circumstances. Experience has shown that two or more witnesses hardly ever give identical accounts of the same incident.[3]

[9] Another contradiction relied on by the appellant relates to the question of whether the appellant was in possession of the canvas bag when he was apprehended. Mhlambi said the appellant had discarded the bag prior to his arrest. Miya said the appellant had been in possession of the bag upon his arrest.

[10] It is significant that Miya remained behind while Mhlambi pursued the appellant. It is possible that Miya may have assumed, incorrectly, since the

[2] *S v Safatsa* 1988 (1) SA 868 (A) at 890F-G.
[3] *S v Bruiners* 1998 (2) SACR 432 (SE) at 439e-f.

police and the appellant returned with the bag, that the appellant had been in possession of the bag at the time he had been arrested. Mhlambi, the arresting officer, was in the best possible position to testify about the arrest of the appellant and whether or not he had been in possession of the bag at that time.

[11] It was submitted on behalf of the appellant that Mhlambi was not being honest when he said he had not lost sight of the appellant from the time the appellant was pointed out to him up until the time of his arrest. It was not suggested during the trial that Mhlambi was dishonest. On the contrary, the appellant's legal representative put the following to Mhlambi during cross-examination:

'… ek [wil] dit aan u stel dat u maak waarskynlik 'n *eerlike* fout, u het die verkeerde man gearresteer.' (Emphasis added.)

[12] In my view the contradictions referred to do not detract from the trial court's findings in respect of Mhlambi, Miya and Twala. The contradictions are not material and relate to details. It must be borne in mind that we are dealing with a tense moving scene. Of significance is the fact that the state witnesses corroborate each other in material respects, especially regarding the identity of the appellant. There can be no doubt that Miya and Twala

either pointed out or described the appellant to Mhlambi, as a result of which Mhlambi pursued and apprehended the appellant. The evidence of all three state witnesses inextricably connects the appellant with the black bag. It is clear from the record that the finding that Mhlambi and the other state witnesses were credible and reliable, is well founded.

[13] The trial court was correct in disbelieving the appellant and finding that his version was not reasonably possibly true. His version as to how he fortuitously came to be in Greylingstad is fraught with improbabilities. It is noteworthy that his version as to the circumstances surrounding his arrest, particularly the general pandemonium which broke out as a result of the shooting and which was the cause of him being incorrectly identified, was not pertinently put to the state witnesses. At best for the appellant, his legal representative tentatively sought, during cross-examination, to get Mhlambi to concede that there had been more than just a warning shot or two fired during the incident. Nothing concerning the pandemonium so graphically described by the appellant was put to Miya or Twala.

[14] It is clear from the judgment of the trial court that the magistrate was acutely aware of and considered the conflicts and discrepancies in the evidence fully and carefully. The trial court, following the approach

suggested in *Sauls*,[4] correctly found, despite the apparent shortcomings in the evidence of the state witnesses, that the 'truth has been told'. In my view the reasoning of the trial court is unassailable. I am satisfied, having regard to the evidence as a whole, that the conflicts were not sufficiently material to warrant a rejection of the version presented on behalf of the state.

[15] Finally, I consider it necessary to deal with further aspects concerning the prosecution of this matter. First, according to the ballistics report the firearm was 'selflaaiend maar nie in staat … om meer as een skoot met 'n enkele drukking op die sneller te vuur nie'. This would appear to have been a semi-automatic firearm. Conviction of the unlawful possession of such a firearm would attract a minimum sentence. As a result of inadequacies in the charge sheet the state was precluded from seeking the imposition of the prescribed minimum sentence. Secondly, the geography and topography of the scene was not adequately dealt with. This was a matter where an inspection *in loco* would have been of great benefit. Alternatively, plans depicting the scene should have been made available to the court. It is difficult, on the current record, to fully appreciate the different vantage points of the witnesses. Thirdly, the prosecutor lamely conceded, in regard to a statement by the appellant on arrest that the firearm was his, that this was a

[4] *S v Sauls* 1981 (3) SA 172 (A) at 180E-F.

confession when plainly it was just an admission. Whether it was made should have been investigated and if necessary its admissibility dealt with.

[16] For the reasons set out, the appeal must fail.

L V THERON
ACTING JUDGE OF APPEAL

CONCUR:
HOWIE P
NAVSA JA