Reportable:	**YES**/NO
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	**YES/**NO
Circulate to Regional Magistrates:	**YES**/NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Case No.: CA56/2020

Regional Magistrates Case No: 40/2019

In the matter between:

ABDUL MPHO SIBEKO **Appellant**

and

THE STATE **Respondent**

Coram: **Reddy AJ & Roux AJ**

Heard: **01 December 2023**

Handed down: **19 March 2024**

ORDER

(i) The appeal against the conviction and sentence of the court a *quo* is upheld.

(ii) The appellant must be brought before a Regional Magistrate, other than **Regional Magistrate Oosthuizen-Senekal** for the matter to commence *de novo*.

(iii) A copy of this judgment must be brought to the attention of the Regional Court President, North West Province and the Director of Public Prosecutions, North West Province, to give effect to paragraph (ii) of this order as a matter of urgency.

JUDGMENT

REDDY AJ

Introduction

[1] The appellant was charged with four (4) counts in the Stilfontein Regional Court before **Regional Magistrate Oosthuizen-**

Senekal. These included, robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 ("the CPA") read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997 ("the CLAA") – count 2; kidnapping – count 3; possession of a firearm in contravention of section 3 read with various other provisions of the Firearms Control Act 60 of 2000 ("the FCA"), and theft – count 4.

[2] On 9 March 2020, the appellant duly represented, pleaded not guilty to all counts, and elected to remain silent. On 29 July 2020, the appellant was convicted on all counts. On 10 September 2020, he was sentenced to twelve (12) years imprisonment on count 1; five (5) years imprisonment each on counts 2 and 3; and three (3) years imprisonment on count 4. The sentences on counts 2, 3 and 4 were ordered to run concurrently with the sentence imposed on count 1 in terms of section 280(2) of the CPA. The order declaring the appellant *ex lege* unfit to possess a firearm in terms of section 103 of the FCA, was left undisturbed.

Background facts

[3] On 3 July 2018 at around midday in Khuma, Stilfontein, Mr. Thabiso Samuel Lethetsa,("Lethetsa") had just had his motor vehicle washed at Khuma Extension 6. As he was leaving, he heard a male voice calling out to him, referring to him as "Samuel." Lethetsa stopped his motor vehicle and waited for the person to approach his motor vehicle. When the person, now known as the appellant, arrived at the motor vehicle, they engaged in conversation. The appellant wanted Lethetsa to secure

employment for him. Lethetsa gathered during the conversation that the appellant was acquainted with a certain Steven who used to work with him. At that time, Lethetsa was employed at Royal Security Company ("Royal Security") as a supervisor.

[4] Pursuant to this conversation, Lethetsa offered a lift to the appellant to collect a certain document in Stilfontein, required for purposes of securing employment at Royal Security. Whilst *en route*, the appellant directed him to stop near a stationary white motor vehicle in the vicinity of the North West Scrapyard. When Lethetsa enquired why he had to stop, the appellant told him that Lethetsa would get a reward from his friend, who was to convey him to Stilfontein. Lethetsa acquiesced. The appellant's friend alighted from the white motor vehicle and approached Lethetsa's motor vehicle. The appellant opened the back door for him and repeated to Lethetsa that he would be rewarded by this friend. As Lethetsa looked at the friend of the appellant, the appellant pointed a firearm at Lethetsa. He then ordered him to bend forward. Lethetsa complied.

[5] The appellant alighted from the passenger side of Lethetsa's motor vehicle and proceeded to where Lethetsa was seated. He pulled Lethetsa from the motor vehicle and took him to the white motor vehicle, where he forced him onto the back seat still bending forward. The appellant sat next to him. Lethetsa was then hit on the head with what he believed was a steel bar. The motor vehicle started moving in the direction of Khuma. Lethetsa was unable to see who the driver was. The attack continued, interspersed with utterings that Lethetsa was to be killed.

[6] In his possession, Lethetsa had his wallet which contained R4000.00, and his bank card. On his waist he had a Norinco 9mm pistol. Also in his possession were two cellphones, a Z3 Blackberry and a Nokia. Whilst being assaulted Lethetsa was searched and dispossessed of all his property. His assailants demanded the pin code to his bank card**.** Initially Lethetsa provided the incorrect pin code. When the assault continued, he provided the correct pin code. This motor vehicle was now moving from Klerksdorp to the direction of Stilfontein. At the last robot just after passing the Matlosana Mall, Lethetsa was dropped off. Lethetsa secured a lift to where to his car had been parked, from where he drove to the Stilfontein Police Station. The next day he discovered from a printout of his bank statement that an amount of R 3300.00 had been withdrawn from his bank account.

[7] On 4 July 2018, the day following the incident, Sergeant Motumi of the Local Criminal Record Centre, lifted identifiable finger/palm prints from the inside of the motor vehicle of Lethetsa. These were later established to be those of the appellant. None of Lethetsa's stolen items were recovered. Lethetsa sustained small hematomas with slight bleeding because of the attack on him. He did not seek medical treatment.

[8] According to the appellant he got to know Lethetsa through his friend, Tibelo, with whom he resided. Tibelo confirmed this. Tibelo knew Lethetsa as a traditional healer. He met Lethetsa for the first time early in February 2017. On subsequent occasions the appellant met Lethetsa when he was in the company of Tibelo. On

those occasions, the appellant would be clad in traditional attire. On the day of the alleged incident, he left Kanana *en route* to Khuma to collect his clothing. Whilst in Khuma, he boarded a local taxi to extension 6, where he alighted and waited for public transport to proceed to Klerksdorp.

[9] Lethetsa emerged driving a Jetta. The appellant stopped him and requested a lift to Klerksdorp. The appellant placed his sports bag on the back seat of the Jetta and occupied the front passenger seat. Whilst in transit Lethetsa enquired about the whereabouts of Tibelo. The appellant retorted that whilst their meetings were sporadic, Tibelo still resided in Kanana. Lethetsa dropped him off at the Stilfontein taxi rank from where he secured public transport to his destination. Three months later the appellant was arrested on an allegation of robbery in Orkney.

The approach on appeal - conviction

[10] It is trite law that the onus rests on the State to prove the guilt of an accused beyond reasonable doubt. If the version of an accused is reasonably possibly true, he must be acquitted.

[11] A court of appeal is not at liberty to interfere with the findings of fact and credibility of a trial court, unless they are vitiated by misdirection, or unless an examination of the record reveals that those findings are patently wrong. In S v *Monyane and Others* 2008 (1) SACR 543 (SCA) at paragraph [15] Ponnan JA stated the test as follows:

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited. ... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e – f)."

See too: *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F.

The grounds of appeal

[12] The appellant assails the convictions on a plethora of grounds. The grounds of appeal raised in the application for leave to appeal, however merit consideration. This is so as the Regional Magistrate skirted the allegations contained particularly at paragraph [9] of those grounds, where the following is stated:

"9. The learned Magistrate erred in relying on the evidence that had not been led during the trial in particular being certain portions of the bail record which respectfully had the following implications:

9.1. The appellant was convicted on evidence that he had not been given an opportunity to either challenge or to offer an explanation regarding during the trial.

9.2. In as much as the proceedings of bail form part of the trial record, the said evidence must be lead during the trial and failure to lead such evidence relegates such evidence to hearsay evidence, which is inadmissible. 9.3. The affidavit evidence from which the learned Honorable Court had extracted certain evidence from, in its judgment on the merits contains the previous convictions of the accused person and the said previous convictions are on the same page as the portion which the Court had extracted from the bail records…"

[13] On 10 September 2020, in the judgment dismissing the application for leave to appeal, the Regional Magistrate failed to deal exclusively with the various grounds of appeal but rather in broad terms dealt with the test for leave to appeal. The Regional Magistrate, as required by the Magistrates Court Rules, was required to furnish a statement of her findings. Rather than address the issue of the admissibility of the bail record which she relied on, the Regional Magistrate on 15 December 2020, filed a response that she had nothing to add to her reasons for judgment and sentence. The relevance and importance of this response considering the serious allegation in this ground of appeal, will become clear below.

Discussion

[14] I am constrained to address a material irregularity by Regional Magistrate Oosthuizen–Senekal. The irregularity is so grave that it vitiates the entire proceedings as it violated the appellant's right to a fair trial. It is dispositive of the appeal to the extent that it is not necessary to consider adjudicating on the remaining grounds of appeal.

[15] The concern of this Court is abundantly demonstrated by the *ipsissima verba* of the Regional Magistrate in judgment on conviction, where the issue of the evidence in the bail application was raised for the first time:

" …. The Court is of the opinion if indeed the complainant knew the accused as already stated above he would have informed the South African Police

Services that one of the assailants were known to him as Adul Sibeko. It is highly unlikely that the complainant would not have even gave a description to the South African Police Services even more so not giving the name of the accused to the police services.

If the Court accepts that the accused have been introduced to the complainant in 2017 by Tibelo if that was indeed the case it is evident that accused did not deal directly with the complainant. Would this be sufficient for the Court to make a negative finding regarding the facts? The Court cannot draw any negative conclusion in this regard.

The Court will however a doubt reject the evidence of prior knowledge as false. **The Court had insight in the formal bail application conducted in the District Court as the District Court record forms part of these proceedings.** The accused was defended Mr Pule in the District Court and on 22 October 2018 a statement was handed in to record by the accused and Annexure A to the statement under the heading the charge read as follows:

"Are you related to the complainant and the answer was my traditional leader."

Under the heading "Other Particulars of importance "the following was stated:

"The complainant is a traditional healer and I consulted him a number of times.

Clearly the accused made no mention of Tibelo his friend that received medicine from the complainant but in fact the accused himself consulted with the complainant not once but a number of times. The accused are blatantly misleading the Court in this regard. Therefore the evidence of the defence witness Tibelo should also be rejected as false." [own emphasis]

[16] The Regional Magistrate not only misconstrued the application of section 60(11B)(c) of the CPA but also the notion of a fair trial. Section 60(11B)(c) provides as follows:

"*60(11B)(c) The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings:* ***Provided that if the accused elects to testify during the***

course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings." [own emphasis]

[17] The district court record of bail proceedings may have been part of the record of proceedings that were transferred to the Regional Court, but that did not automatically render it part of the trial record. It is so that section 60(11B)(c) of the CPA not only makes the record of the bail proceedings part of the record of the subsequent trial record, but makes any evidence that the accused elects to give at the bail hearing, admissible against him or her at trial, provided the court hearing the bail application had warned the accused of the risk of such use. The record of bail proceedings is neither automatically excluded from nor included in the evidentiary material at trial. Whether or not it is to be excluded is governed by the principles of a fair trial. The Regional Magistrate seems to have mistakenly interpreted this bail provision to mean that the record of the bail proceedings is automatically admissible *in toto*.

[18] In *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) paragraph 87, the Constitutional Court held in this regard that:

"[87] … In the narrow context of the right to be released from detention the crux of the issue is that sub-s 60(11B)(c) not only makes the record of the bail proceedings part of the subsequent trial record, but makes any evidence the accused elects to give at the bail hearing admissible against him or her at trial provided the court hearing the bail application had warned the accused of the risk of such use. The first part of sub-s (11B)(c), which automatically incorporates the bail record into the trial record, is an unremarkable

procedural provision which merely allows a shortcut: under s 235 of the CPA a certified copy of the bail record can in any event be handed in at the trial."

(emphasis added)

[19] The formulation of the first question on appeal, in *Director of Public Prosecutions, Transvaal v Viljoen* (411/03) [2004] ZASCA 145; [2005] 2 All SA 355 (SCA); 2005 (1) SACR 505 (SCA) (2 December 2004) is apposite in the present appeal. The SCA formulated the question thus:

"**Question 1**

Was the judge *a quo* entitled to make factual findings on the basis of inferences drawn from documents forming part of the record of the bail proceedings and to rule against the admissibility of evidence without affording the parties a proper opportunity to adduce evidence in respect of the relevant factual issues."

[20] The question was answered very succinctly, as follows at paragraphs [33] and [34] of the judgment of the Supreme Court of Appeal:

"[33] It does not follow from the fact that the record of the bail proceedings forms part of the record of the trial that evidence adduced during the bail proceedings must be treated as if that evidence had been adduced and received at the trial. The record of the bail proceedings remains what it is, namely a record of what transpired during the bail application.

[34] The judge *a quo* relied on statements made in documents handed up during the bail application. These statements constituted hearsay evidence which had not been admitted at the trial. He, therefore, erred in doing so. In any event, that the judge *a quo* was not entitled to make factual findings without affording the parties a proper opportunity to adduce evidence in

respect of the relevant factual issues is so self-evident that nothing further needs to be said in this regard."

(emphasis added)

[21] In *Machaba and Another v S* (20401/2014) [2015] ZASCA 60; [2015] 2 All SA 552 (SCA); 2016 (1) SACR 1 (SCA) (8 April 2015) at paragraphs 26-27, the SCA echoed what was said in *DPP v Viljoen*. The facts of *Machaba*, are otherwise distinguishable from the present appeal.

[22] The introduction of bail proceedings must be accompanied by certain preliminary findings. The most notable of which is that the appellant should have been informed that the bail proceedings are admissible at the trial subject to him being warned by the Magistrate, whether in respect of an affidavit or *viva voce* evidence, that anything said, may be used against him and that such evidence becomes admissible in any subsequent proceedings (trial). This warning which could only be given by the Magistrate was required before the appellant adduced both the affidavit and *viva voce* evidence in support of his application for bail. The omission on the part of the Magistrate may not necessarily impact the bail application, but undoubtedly may have an impact on the question of a fair trial at any subsequent trial of the appellant.

[23] On the authority of *DPP v Viljoen*, the unilateral practice of the Regional Magistrate of introducing the record of the bail proceedings in the judgment on conviction for the first time,

constitutes not only a gross irregularity in the proceedings but a material misdirection. This practice was not anchored in the proper interpretation of the admissibility of bail proceedings. Whilst I accept that the Regional Magistrate is an administrator of justice, and not merely a figurehead, it is undeniably expected that the Regional Magistrate should direct and control the proceedings according to recognized rules of procedure to see that justice is not only seen to be done, but is done. See: *R v Hepworth* 1928 AD 265 at 277.

[24] Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. See: *S v Dlamini; S. v Dladla and Others; S. v Joubert; S. v Schietekat supra* at paragraph [99] and *Take and Save Trading (CC) v Standard Bank of SA Limited* 2004 (4) SA (1) at paragraph [3]. Controlling and directing the proceedings in a criminal trial certainly does not entail the unilateral introduction of the bail proceedings in judgment in circumstances where the parties were not afforded an opportunity to give effect to the *audi alterum* principle of natural justice.

[25] The Regional Magistrate pronounced on the admissibility of the bail proceedings during her judgment. This was at a point where *ex facie* the record, the question of guilt was being adjudicated and crucially when both the state and the appellant had closed their respective cases. A well-timed ruling on admissibility has important procedural ramifications. It undoubtedly allows for fair trial rights to

be properly ventilated, and that in the application of fair trial rights for substance to prevail over form. In the context of fair trial rights, it allows an accused to make an informed decision. It is prejudicial to an accused and the State for that matter to be ambushed, as transpired in this matter. For the accused to have had a fair trial he must have knowledge of the case he has to meet. See: *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (5) BCLR 451 (CC).

[26] The ill-contrived decision by the Regional Magistrate to find the bail proceedings admissible at the judgment stage was unfair to the appellant and the State as representative of the victim. In *S v Ndhlovu* [2002] ZASCA 70; 2002 (6) SA 305 (SCA) at paragraph [18], Cameron JA makes it clear, that:

"[A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. **This cannot be done for the first time** at the end of the trial, nor in argument, still less **in the court's judgment**, nor on appeal. The prosecution must before closing its case clearly signal its intention to invoke the provisions of the Act, **and the trial judge must before the State closes its case rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.**" [own emphasis]

[27] There is no doubt that the appellant was ambushed by an unheralded admissibility ruling on the bail proceedings. The ineluctable conclusion to be drawn from the judgment on conviction by the Regional Magistrate is that more than a peek was impermissibly taken at the entire bail proceedings.

[28] Another consequence of the Regional Magistrate delving into the bail proceedings is that she would have been privy to the previous convictions which the appellant disclosed, which section 60(11B)(c) of the CPA excludes. The Regional Magistrate failed to address this when it was pertinently raised in the grounds on which leave to appeal was sought.

Conclusion

[29] It is incontrovertible that one of the pillars for the rejection of the appellants version was allied to inadmissible evidence. This tainted the appellant's right to a fair trial. A plethora of case law of the SCA emphasizes the role of a judicial officer. Reference to a few will suffice. In *S v Tyebela* 1989 (2) SA 22 (A) at page 29, Milne JA stated that an accused person is entitled to a fair trial which:

> "…presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or procedure which the law requires."

[30] *S v May* 2005 (2) SACR 331 SCA the learned Lewis JA also stated that:

> "Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are not required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable."

[31] Lastly, in *S v Le Grange* 2009 (1) SACR 125 (SCA) at paragraph [21], Ponnan JA stated that:

"It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial…Fairness and impartiality must be both subjectively present and objectively demonstrated…bias denotes a state of mind that is in some way predisposed to a particular result".

[32] The appellant has not had a fair trial and the proceedings are vitiated by the conduct of the Regional Magistrate.

Order:

[33] In the premise, the following order is made:

(i) The appeal against the conviction and sentence of the court a *quo* is upheld.

(ii) The appellant must be brought before a Regional Magistrate, other than **Regional Magistrate Oosthuizen-Senekal** for the matter to commence *de novo*.

(iii) A copy of this judgment must be brought to the attention of the Regional Court President, North West Province and the Director of Public Prosecutions, North West Province, to give effect to paragraph (ii) of this order as a matter of urgency.

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A REDDY
ACTING JUDGE OF THE
HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

I agree

_____

B ROUX
ACTING JUDGE OF THE
HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

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Date of Hearing: 01 December 2023

Handed down: 19 March 2024