



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case No: 568/2022

In the matter between:

FRANK NABOLISA

APPELLANT

and

**THE REGIONAL
RESPONDENT
COURT MAGISTRATE
MS SYTA PRINSLOO N.O.**

FIRST

**THE DIRECTOR OF PUBLIC
PROSECUTIONS:
GAUTENG DIVISION OF
THE HIGH COURT,
JOHANNESBURG**

SECOND RESPONDENT

Neutral Citation: *Nabolisa v The Regional Court Magistrate and Another* (568/2022) [2023] ZASCA 07 (19 January 2024)

Coram: ZONDI and MOKGOHLOA JJA and NHLANGULELA AJA

Heard: 24 AUGUST 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 19 January 2024.

Summary: Appeal against the dismissal of an application for review – whether the appellant's right to a fair trial was infringed – the appeal is dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Bokako AJ with Yacoob J concurring, sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

NHLANGULELA AJA (ZONDI and MOKGOHLOA JJA concurring):

Introduction

[1] The appellant together with one Ms Natasha Mashiane, both legally represented, appeared before the first respondent (sitting as the regional magistrate at the Regional Division of Johannesburg, Alexandra) each charged on two counts of dealing in or unlawful possession of cocaine in contravention of s 5(b) or s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act); and unlawful possession of paracetamol (acetaminophen) and methenamine (hexamine) in contravention of s 22A of the Medicines and Related Substances Act 101 of 1965 (the Substances Act). At the conclusion of the trial, the appellant was convicted of dealing in cocaine and unlawful possession of paracetamol and methenamine. He was sentenced to undergo imprisonment for a cumulative period of 30 years. Further, an order was issued that the exhibits, 2.455 kg of cocaine, 5.681 kg of paracetamol and 2.748 kg of

methenamine are forfeited to the State. Ms Mashiane was found not guilty in respect of both counts, and she was acquitted.

[2] Having exhausted all the avenues of appeal, albeit without success, the appellant brought an application to the Gauteng Division of the High Court, Johannesburg (high court) seeking an order to review and set aside the decision of the first respondent convicting and sentencing him on the basis that his fair trial rights were infringed, which vitiated the criminal proceedings in their entirety. On 8 April 2021 the high court (per Yacoob J and Bokako AJ) dismissed the review application. The appeal to this Court is with the leave of the high court.

The litigation history

[3] The appellant's efforts to have his conviction and sentence quashed commenced by engaging in the appeal process. Following upon the sentence proceedings on 19 May 2014, he brought an application for leave to appeal against both the conviction and sentence. The first respondent found that the application for leave had no reasonable prospect of success on appeal, and she dismissed it. Undeterred by that outcome, the appellant petitioned the Judge President of the Gauteng Division of the High Court for leave to appeal against conviction and sentence. On 5 September 2014, Mokgoathheng and Strydom JJ dismissed the appellant's petition for leave to appeal against both the conviction and sentence. In a further application for special leave to appeal to this Court against conviction and sentence, on 16 July 2015, Navsa ADP and Mbha JA dismissed the application on the ground that there were no special circumstances present that merited a further appeal. To that extent, all the efforts of the appellant to have his conviction and sentence overturned on appeal came to naught. It is against that background that the review remedy of the appellant must be considered.

Background facts

[4] The facts which gave rise to these proceedings are the following: Acting on a telephonic police intelligence report, a team of police officers led by Warrant Officer Hein Leonard De Jager went to house no. 2053 Makwata Street, Ebony Park where they found one Ms Audrey Radian and her son in occupation of the house. Ms Radian introduced herself as the mother of Ms Mashiane, the appellant's girlfriend. She permitted them to search the house. In a bedroom that she identified to the police officers as belonging to Ms Mashiane, they found two suitcases, one maroon and another black in colour, in which they found small plastic packets that contained large quantities of powdery substances that they suspected was cocaine. Thereafter, they removed the exhibits to the police station, wrote them into the SAP 13 Register and kept them in the storeroom. These exhibits were later analysed by Sergeant Rodney Machimane at the state laboratory.

[5] Sgt Machimane and Major Nolovuyo Gifita Makwatane, the government employees attached to the Forensic Science Laboratory unit of the SAPS testified on behalf of the state. Sgt Machimane testified that he was a forensic analyst who was charged with the task of analysing the exhibits to verify if they were 'dangerous dependence producing' substances within the definition of that term in the Drugs Act and the Substances Act respectively. After rigorous analytical testing performed in a laboratory applying internationally accepted comparative analytical techniques of gas chromatography coupled to mass spectrometry (the GC-MS) and Fourier Transform Infrared Spectroscopy (the FT-IR), he found that out of the substances that were contained in the maroon suitcase (evidence bag FSG-249068) and the black suitcase (evidence bag FSG-249067), substances weighing 2.455kg; 5.681kg; and 2.748kg were cocaine, paracetamol and methenamine respectively. The forensic evidence adduced by

Sgt Machimane was foreshadowed in the affidavit that he had prepared in terms of s 212 of the CPA. It was admitted in evidence as Exhibit 'G'.

[6] The appellant was legally represented at the trial. But he did not cross-examine the state witnesses, testify in his own defence or call a witness to testify on his behalf. Mr Hamilton, the legal representative for Ms Mashiane, led the evidence of Dr Cornelius Christoffel Viljoen who is qualified as a biochemist with forensic experience in research of snake venoms. Dr Viljoen disputed the integrity of the forensic analysis and findings of Sgt Machimane that some of the exhibits contained cocaine powder, alleging that the 303 molecular mass spectrometry found is a chemical description of cocaine as well as other substances that have been compiled by the USA National Institute for Standards and Technology. He testified that the GC-MS technique that was applied by Sgt Machimane did not have unlimited capacity to produce unquestionable results. He testified that since only a few of the majority samples obtained from the exhibit substances were analysed, the findings of Sgt Machimane that the exhibits contained cocaine, paracetamol and methenamine were not conclusive. He also testified that the findings made by Sgt Machimane are incorrect because the testing machines used had not been calibrated.

[7] Mr Hamilton also called Dr Andrew Dinsmare to testify. He has a doctoral degree in chemistry. In the course of executing duties as a chemistry lecturer at the University of the Witwatersrand, he ran a private analytic laboratory for 15 years for the benefit of research students. He once assisted in a research project of a student on an assignment that had been offered by the National Intelligence Agency. The assignment involved forensic analysis of narcotics or drug-related substances. However, it was the student, not Dr Dinsmare that did the analysis. He testified that the findings that the exhibit substances contained cocaine, paracetamol and methenamine, were invalid

because not all the samples were tested in the HP9 machine. The reference samples used by Sgt Machimane were not named and the results of the forensic analysis were hastily written by hand instead of the HP9 machine printing them out.

[8] To the extent that Dr Viljoen queried the fact that the GC-MS machine was calibrated, the prosecution applied for the re-opening of the state's case to lead the evidence of Major Makwatane, which was granted. Major Makwatane's evidence was that she, in her capacity as a laboratory technician, had carried out suitability tests on the two machines described as HP4 and HP9 that were later used by Sgt Machimane to analyse the exhibits. She disavowed any involvement in the exercise of forensic analysis, but confirmed that the machines were calibrated properly, and they were in good condition for the analysis of exhibits to be carried out.

In the high court

[9] The appellant brought an application seeking an order to review the first respondent's decision to convict and sentence him. He relied on the following grounds of review:

- (i) The second respondent's failure to make proper disclosure and the first respondent's failure to order proper disclosure of the working papers of the forensic analyst.
- (ii) The first respondent placed an onus on an accused in a criminal matter.
- (iii) The appellant was convicted of a non-existing offence of possession with intention to deal, relying on a presumption, contained in s 21 of the Drugs Act¹, that has been declared unconstitutional.

¹ Section 21 presumptions were declared unconstitutional in *S v Bhulwana*; *S v Gwadiso* 1995(2) SACR 748 (CC)

(iv) The first respondent permitted rude and inappropriate cross-examination by the second respondent's counsel.

(v) Evidence of a state witness in favour of the defence was rejected when the witness was not discredited.

(vi) Sentencing proceedings were unfair.

[10] The high court rejected all of the appellant's grounds of review and dismissed the application. It, nevertheless, granted him leave to appeal to this Court.

In this Court

[11] The issue is whether the high court erred in finding that the appellant's right to a fair trial was not infringed. To succeed in his review application the appellant had to bring his application within the purview of s 38, read with s 35(3) of the Constitution² by satisfying the high court on the facts supporting his claim that his constitutional rights were infringed during the criminal proceedings. In terms of *S v Zuma and Others*³ (*Zuma*) the s 35(3) fair trial rights of the Constitution that the appellant seeks to advance in his review proceedings embrace a concept of substantive fairness that is much broader than the fair trial rights themselves. The Constitutional Court in *Zuma* held at para [16]:

² Section 38 provides: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

Section 35(3) provides: 'Every accused person has a right to a fair trial, which includes the right—...(i) to adduce and challenge evidence; . . .(l) not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed or omitted;'

³ *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 para 16. See also *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656 (SCA); [2010] 3 All SA 304 (SCA) para 4.

‘That *caveat* is of particular importance in interpreting section 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. 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

"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".

A court of appeal, it was said, (at 377)

"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'."

That was an authoritative statement of the law before 27th April 1994. Since that date section 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.’

[12] The appellant’s attack on the high court’s judgment is based on the following grounds:

- (a) The prosecutor suppressed the working papers used in the forensic analysis of the exhibit substances during the state case, thus depriving the appellant of his right to challenge the forensic evidence adduced by Sgt Machimane which proved that some of the exhibits were cocaine;
- (b) The first respondent failed to order the re-calling of Sgt Machimane for cross-examination on the working papers;
- (c) Sgt Machimane conducted selective forensic analysis of some of the samples, instead of all, taken from the exhibit substances, which was irregular;

- (d) The HP4 and HP9 machines used and the GC-MS technique applied by Sgt Machimane in analysing the exhibit substances did not meet internationally recognized scientific standards;
- (e) The condonation by the first respondent of the prosecutor's use of rude and inappropriate language, 'Ag shame', when cross-examining Dr Dinsmare, the defence witness, was improper; and
- (f) The finding by the first respondent that the appellant and his counsel had not challenged the evidence of Sgt Machimane when that had been done by Mr Hamilton, the legal representative for the co-accused, was erroneous.

[13] In argument, it was submitted on behalf of the appellant that the irregularities listed above constituted an infringement of the appellant's constitutional rights as set out in ss 35 (3) (i) and (l) of the Constitution. It was contended further that the suppression of and/or late disclosure of the working papers denied the appellant information that was favourable to his defence, denied him his right to raise contradictions in Sgt Machimane's evidence, concealed irregularities in methods used to analyse the exhibit samples and made it possible for Sgt Machimane not to be recalled by the first respondent to clarify the discrepancies between his s 212 affidavit and the working papers on which this scientific analysis of the exhibit samples was done.

[14] On the other hand, the State raised a point *in limine* urging this Court to dismiss the appeal on the ground that this appeal is *res judicata*⁴ as the grounds for the appeal against the judgment and order of the high court are the same as those on which this Court dismissed the application for special leave to appeal. This same point *in limine* had also been raised before the High Court, and it was dismissed on the basis that the grounds for the review application and those for

⁴ In *Molaudzi v S* [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) para 14 it was stated "Res judicata is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties."

the application for special leave overlap. In the absence of an appeal against that decision, the point *in limine* cannot succeed.

[15] On the merits of this appeal, it was submitted on behalf of the State that the contention by the appellant that it had suppressed the working documents of the forensic analysts, was not correct. The State argued that the documents were not part of the docket. In any event, the s 212 statement of Sgt Machimane that was contained in the docket was discovered, and it was used by the prosecutor when leading the evidence of Sgt Machimane. Both the State and defence had closed their cases when Mr. Hamilton brought an application in terms of s 87 (1) of the Criminal Procedure Act 51 of 1977 (CPA)⁵ to be furnished with further particulars of the docket. Although the first respondent dismissed the application, the working papers sought were furnished to Mr Hamilton upon request for the same from the Forensic Science Laboratory. Counsel for the State argued, with reliance on *Mkhize v S*⁶, that the finding of the trial court that some of the exhibit samples were cocaine was correct as Sgt Machimane was not challenged by counsel for the appellant and the alleged discrepancies between the working papers and the evidence of Sgt Machimane, as alluded to by Mr. Hamilton, were never put to Sgt Machimane.

[16] In any event, the State submitted that the fact that the working documents had certain numbers written in pen did not contradict the correctness of the evidence of Sgt Machimane. It argued that both Dr Viljoen and Dr Dinsmare lacked the skills and experience in forensic analysis of cocaine substances using

⁵ Section 87 (1) serves the right of the accused to obtain more information on what has been alleged or is missing in the charge sheet to prepare his/her defence.

⁶ The case of *Mkhize v S* (390/18) [2019] ZASCA 56 (1 April 2019) restates the principle of law that the accused has an obligation to put his/her case to the state witnesses under cross-examination, and the failure to do so strengthens the state case against him/her. In terms of the decisions in the *President of the Republic of South Africa v South African Rugby Football Union & Others* [1999] ZACC 11; 2000 (1) SA 1 (CC) para 61; and *S v Boesak* 2000 (3) SA 381 (SCA), the appellant deliberately abandoned his fair trial protection.

GC- MS and FT-IR techniques. The State further submitted that the use by the State counsel of the term “Ag Shame” during the cross-examination of Dr Dinsmare did not constitute an appropriate language. It argued that the comment was made in response to Dr Dinsmare’s criticism of the evidence of Sgt Machimane that he could not have analysed the number of samples which he said he did. Dr Dinsmare, proceeded the argument, could not criticize the evidence of Sgt Machimane when he had not studied Sgt Machimane's working papers before testifying.

[17] The allegations that the appellant’s fair trial rights were violated during the trial are not borne out by the evidence. The police witnesses conducted a lawful search and seizure of the substance exhibits. I cannot find irregularities in the manner in which the charge sheet was framed and the charges were put to him. The first respondent handled the plea proceedings and the trial properly. The offences that were proved against the appellant were competent and he was convicted on the strength of credible state evidence. The evidence of both Dr Viljoen and Dr Dinsmare was correctly rejected by the first respondent. It transpired during cross-examination that the criticism made by these witnesses against the forensic findings of Sgt Machimane was not buttressed with scientific facts. They testified without having read the working documents of Sgt Machimane. They were proved not to possess experience in analysing drugs. They had no experience in the use of the HP4 and HP9 machines that were calibrated by Major Makwatane and used by Sgt Machimane. Dr Viljoen conceded that he was a ‘chemical layman’. He was unable to point to any one compound in the list compiled by the USA National Institute for Standards and Technology that has the same molecular mass of 303 as the cocaine compound. Dr Dinsmare conceded that he was rushed to give his testimony without having had the benefit of consultation with Sgt Machimane. He conceded that the reference samples used by Sgt Machimane to analyse the exhibit substances

were in accordance with international best practices. He conceded that Sgt Machimane did find cocaine and methenamine in the exhibits.

[18] I reject the appellant's contention that the use of the phrase 'ag shame' by the State counsel during the cross-examination of Dr Dinsmare was so inappropriate to such an extent that it undermined the integrity of the proceedings. A proper reading of the record reveals that the prosecutor merely used the comment to lambast Dr Dinsmare's stratagem of shifting blame for not having prepared for trial.

[19] The appellant did not ask for further particulars of the charge relevant to the working papers. Neither did he ask for the discovery of the working papers of the forensic analysis of the substances that had been found in his possession⁷. The dismissal of the appellant's application for further particulars of the charges was proper, it having been made on the basis that the papers sought were not part of the police docket and were not sought for the purpose of preparation for trial. He chose not to exercise his constitutional right to challenge the evidence of Sgt Machimane that directly implicated him in the commission of the offences with which he was charged. The appellant, still being legally represented, elected not to testify.⁸

[20] Consequently, none of the grounds of appeal have been proved. The judgment of the high court cannot be faulted.

⁷ As indicated in *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC), 1996 (1) SA 725 (CC) at 778E the accused will have access to relevant parts of the docket if he or she asked for discovery thereof.

⁸ It was stated in *Osman and Another v Attorney General* [1998] ZACC 14; 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 para 22 and *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 57 that the exercise of the right to remain silence is not a risk, but has consequences for trial proceedings.

[21] In the result the following order is made:

The appeal is dismissed.

ZM NHLANGULELA
ACTING JUDGE OF APPEAL

Appearances

For Appellant: M Kolbe SC

Instructed by: HJ Van der Westhuizen Attorneys, Roodepoort
Wessels & Smith Attorneys, Bloemfontein

For Respondents: AM Williams

Instructed by: Office of the State Attorney, Pretoria
C/O Director of Public Prosecutions, Pretoria
Director of Public Prosecutions, Bloemfontein