THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 800/2015

In the matter between:

TREVOR GUMEDE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Gumede v The State* (800/2015) [2016] ZASCA 148 (30 September 2016)

Coram: Bosielo, Swain, Zondi and Mocumie JJA and Dlodlo AJA

Heard: 24 August 2016

Delivered: 30 September 2016

Summary: Evidence obtained as a result of an unlawful search in violation of right to privacy – evidence of pointing out obtained after failure to explain consequences of not remaining silent and co-ercion – detrimental to administration of justice – evidence inadmissible in terms of s 35(5) of the Constitution.

ORDER

On appeal from Natal Provincial Division of the High Court (P C Combrinck and Theron JJ concurring and Kondile J dissenting, sitting as a court of appeal).

1 The appeal succeeds and the convictions and sentences imposed pursuant thereto are set aside.

JUDGMENT

Zondi JA (Bosielo, Swain and Mocumie JJA and Dlodlo AJA concurred):

[1] The appellant was indicted in the Durban and Coast Local Division, Durban, on charges of murder, robbery with aggravating circumstances, unlawful possession of a firearm and ammunition. Originally, there were 4 accused but charges were withdrawn against accused 2 and 3. The appellant was accused 1 and his remaining co-accused, Sipho Patrick Magwaza (Magwaza) was accused 4. Magwaza was only charged with murder and robbery with aggravating circumstances.[1]

[2] The State's case against the appellant was based on two pieces of evidence namely a firearm with ammunition allegedly discovered by the police during search and seizure operation at the appellant's house and verbal statements that he had allegedly made at a pointing out. The appellant pleaded not guilty to all of the charges preferred against him. In a written statement in terms of s 115(1) of the Criminal Procedure Act 51 of 1977 (the CPA), he contended that the two sets of evidence, one arising from the search conducted at his home at 26 Portadown Place, Wiggins Estate, Cato Manor on 16 May 2000; and the other from the pointing out, were

[1] Magwaza's convictions and sentence were set aside on 25 March 2015 by this Court and the case is reported as *S v Magwaza* 2016 (1) SACR 53 (SCA).

inadmissible. He alleged that the search pursuant to which a firearm was allegedly discovered was unlawful and that he was assaulted by police officials resulting in him making a pointing out which was done under duress.

[3] At the commencement of the trial, the State informed the trial court that it intended to rely on two pointings out that were done by the appellant and Magwaza, as well as the contents thereof, the admissibility of which the appellant had forewarned he would challenge. Despite this warning, the State, instead of holding a trial-within-trial proceeded to lead evidence in the main trial about the search and the finding of a firearm and ammunition. In an attempt to correct this apparent procedural irregularity a trial-within-trial was subsequently held with several police officers, the appellant and Magwaza testifying under oath. It was agreed that the evidence already led in the main trial would be regarded as having been given in the trial-within-trial.

[4] The trial court ruled admissible both sets of evidence, namely evidence of the pointing out by the appellant, and the evidence of the finding of the firearm and ammunition. The main trial proceeded and at the conclusion of which the appellant was convicted of all the charges preferred against him. He was sentenced to life imprisonment on count 2 (murder); 15 years' imprisonment on count 3 (robbery with aggravating circumstances) and three years' imprisonment on counts 4 and 5 (possession of an unlicensed firearm and ammunition) which were taken together for the purposes of sentence.

[5] The appellant appealed to the full court of the Natal Provincial Division against the convictions. The appeal was dismissed in a majority judgment delivered by P C Combrinck J with Theron J concurring. Kondile J dissented. I will revert to the court below's findings later in this judgment.

[6] The events giving rise to the appellant's convictions and sentences are briefly as follows: During the morning of 13 April 2000, a pension pay-out point at Klaarwater Community Centre was attacked by a group of armed men during which approximately R460 000 was taken. In the course of the robbery, the perpetrators opened fire and as a result, one of the security guards at the

scene, Mr Bhekinkosi Zulu (the deceased), was fatally wounded and dispossessed of his firearm with ammunition. The deceased later passed away at hospital. The robbers departed from the scene and shortly thereafter several police officers arrived. Inspector Sagren Govender (Govender) from Westmead Murder and Robbery Unit, Pinetown, who formed part of the investigating team, arrived at the crime scene around 10h00. Govender observed and identified the spent cartridge casings as belonging to a 9mm pistol and was present when the photos of the scene were taken. No weapons were found at the scene and the information he received was that the pistols of the deceased and the erstwhile second accused, who was a security guard, had been taken by the robbers. He was also told that they had fled in a red Ford Bakkie. Later that afternoon, Govender together with other police officials found this vehicle abandoned at Nagina Township in the Mariannhill area.

[7] A month later, on 16 May 2000 at about 01h00 a team of detectives, including the investigating officer, Inspector Nkosinathi Mbatha (Mbatha), led by Govender, acting on the strength of information provided to them by a police informer, proceeded to the appellant's home. They gained entry into the house by forcing open the front door. Once they were inside the house they conducted a search, during which a 9mm pistol was found under the appellant's pillow. The appellant, who was found sleeping in the bedroom, was arrested and taken away by the police. It is common cause that the search at the appellant's home and his arrest were conducted and effected without a warrant.

[8] Later that morning at about 03h00, Govender and Mbatha interviewed the appellant at the Westmead Murder and Robbery Unit offices. Mbatha acted as an interpreter for the appellant from English to isiZulu. According to Govender, before the start of the interview he informed the appellant of his rights in terms of s 35 of the Constitution and did so by reading them from the notice of rights form. The appellant signed the form to confirm that he was informed of his rights. During the course of the interview, so testified Govender, the appellant incriminated himself which prompted him to stop the

interview. He thereafter informed the appellant that, if he wished to, he could make a statement to a magistrate or to a police officer of the rank of Captain and point out certain points to that police officer. The appellant, Govender stated, did not wish to make a statement to a magistrate, but elected rather to do a pointing out with a police officer.

[9] Following what the appellant told Govender during the interrogation, Captain Edward van Rensburg (Van Rensburg) from Serious Violent Crimes Unit, Durban, was approached and he agreed to conduct a pointing out with the appellant. According to the pointing out form completed by Van Rensburg the appellant was brought to him for a pre-pointing out interview at Westmead Murder and Robbery Unit office on 16 May 2000 at 13h30 during which he asked the appellant pertinent questions regarding his willingness to do the pointing out and also explained what would occur at the pointing out. Sergeant Magwaza (Magwaza) acted as an interpreter for the appellant from English to isiZulu. Van Rensburg denied that the appellant had told him that the pointing out was not voluntary and that he had, prior thereto, been taken to the crime scene by Govender and Mbatha who told him what to point out to Van Rensburg. According to van Rensburg, during the pointing out, the appellant directed him to the scene of the crime in Klaarwater where he pointed out a white building with post boxes outside which the appellant identified to be the place where he and ‘others robbed the pension money from the security guards’.

[10] As mentioned, the appellant denied the charges against him. In relation to the search at his home on 16 May 2000, he testified that in the early hours of that morning while sleeping in his bedroom (with his wife and small child), he was woken up by a number of police officers with firearms pointed at him. He was asked who Trevor was, and ordered to lie on the floor. The police started to search his home, and also escorted his wife and his youngest child out of the room. During the search he was taken to the bathroom and in the passage way, he met Govender who asked him about a firearm and an AK47. He informed Govender that he did not know anything about a firearm and an

AK47. He denied that a firearm was found under the pillow in his bedroom. He was arrested and taken away.

[11] The appellant's denial that a firearm was found in his bedroom is contrary to the version which his legal representative had put to Govender at the trial. The following was put:

'MS PUNGULA . . . And if he comes to the box he will say that firearm was recovered in his presence or in the presence of his wife, in the bedroom that they were sleeping in. --- M'Lord, the accused was sleeping alone and I recovered the firearm that I found in that bedroom'

[12] With regards to the events leading to a pointing out, the appellant testified that after his arrest, he was taken from his home in Mayville to Umlazi. It was only after going to Umlazi, so he testified, that he was taken to the detectives' offices at Westmead where he was interrogated by the police officers, including Govender and Mbatha. There he was tortured. He was made to undress, to don a black plastic bag and to lie down. A tube was pulled tightly over his face causing him to suffocate. During this torture, he was told to disclose where the money was. He had no knowledge of the money but, to save his life, he lied and said the money was at his father's house at Chesterville. It was only then that he was taken to his father's house. He added that, in saying that the money was there, his motive was to be taken to his father's house, not to inform his father of his arrest, but to tell his father that he thought he was going to be killed. The police went with him to his father's house and when they arrived, he went into the house with several police men. He told his father that he feared that he would be killed, and that he had informed the police that he had stored money there. Govender and Mbatha were amongst the police officials present, and Mbatha shortly after they went inside the house, took the appellant outside to wait in the police vehicle.

[13] The police remained in the house for some time, and having found nothing, returned to the vehicles and drove away with the appellant. After driving to different destinations again with Govender and Mbatha, he was then

taken to a certain spot in Klaarwater, which he claimed he was told to point out to Van Rensburg later that day, as the place where the robbery occurred. This is what he pointed out to Van Rensburg, when the latter accompanied him to do a pointing out later that day. The appellant maintained that he was forced to point out the scene to Van Rensburg. Govender and Mbatha threatened him with torture if he failed to do so. The appellant alleged that before he was taken to the pointing out, Govender made him to sign a blank form with dotted lines on it.

[14] As I have pointed out in paragraph 4 above, the trial court ruled that the evidence of the discovery of a firearm with ammunition and pointing out was admissible and rejected the appellant's contention that it ought to be excluded. In relation to the search and seizure operation conducted at the appellant's house without a search warrant, the trial court was prepared to assume that despite the urgency, a search warrant could have been obtained and that the illegal entry was unnecessary. Although the trial court was of the view that in circumstances the evidence concerned would be inadmissible it nevertheless regarded it to be admissible because of the provisions of s 35(5) of the Constitution. The trial court reasoned that the exclusion of the impugned evidence would, on the facts of the case, have brought the administration of justice into disrepute. As to the evidence of pointing out the trial court admitted it because it was satisfied that the pointing out had been done freely and voluntarily, that the appellant had full knowledge of his rights and that he had waived them. It found the appellant's version to have been wholly improbable as to be plainly untruthful and rejected it. The trial court held that the evidence of the discovery of the firearm and ammunition was corroborated by the evidence of the pointings out and the confession made at the time by the appellant.

[15] The findings of the trial court found favour with the majority in the court below and were endorsed on the reasoning that any delay in obtaining a warrant would have defeated the object which the police sought to achieve, namely the arrest of the appellant. The court below referred to s 25(3) of the Criminal Procedure Act in support of its reasoning. As to the evidence of

pointing out, the court below held that it was properly admitted. Accordingly, the court below dismissed the appellant's appeal. The current appeal is with the special leave of this court.

[16] Before us the appellant submitted that the evidence concerning the discovery of the firearm ought to have been declared inadmissible on the grounds that the search and seizure operation was patently unlawful and fell to be excluded in terms of s 35(5) of the Constitution. It was argued that the search in the appellant's home was illegal and irregular because it was conducted without a search warrant and after entry into the house had been illegally obtained. In relation to the pointing out and confession, it was submitted that the State failed to prove that the appellant's constitutional rights were explained to him prior to and during the pointing out and confession. It was further submitted by the appellant that the State failed to prove that the pointing out and confession were freely and voluntarily made.

[17] Although the State in its heads of argument had submitted that the search and seizure operation conducted at the appellant's house was lawful and that the firearm and ammunition found were properly admitted it conceded during the hearing that the search was unlawful and that the police ought to have obtained a search warrant. In relation to the pointing out, the State sought to justify the admission of the evidence emanating from the pointing out on the ground that the appellant did the pointing out freely and voluntarily.

[18] The issue before us therefore is whether the trial court was correct in ruling that the evidence of both the search and seizure operation and the pointing out and confession, was admissible.

[19] In South Africa, prior to 1994, the admissibility of improperly obtained evidence was determined on the basis of its relevancy and the court was not

concerned how that evidence was obtained.[2] It would appear that the court, however, had a discretion to exclude evidence if the strict rules of admissibility would operate against the accused.[3] That approach changed with the advent of the interim Constitution which came into force on 27 April 1994. Since that date the Constitution has required criminal trials to be conducted in accordance with notions of basic fairness and justice, but it is for all courts hearing criminal trials or criminal appeals to give content to those notions.[4] (See also *S v Zuma & others* 1995 (1) SACR 568 (CC) para 16; 1995 (2) SA 642; 1995 (4) BCLR 401)).

[20] The interim Constitution did not expressly deal with the admissibility of improperly obtained evidence.[5] If it was found that there had been a violation of the accused's rights (which were guaranteed by s 25 of the interim Constitution), that entitled the accused to approach the court for an appropriate relief. In other words, it did not prescribe a remedy for treating unconstitutionally obtained evidence. The remedy now lies in s 35(5) which provides as follows:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[21] In other words, s 35(5) requires the court to exclude evidence obtained in a manner that violates any right in the Bill of Rights[6] if either the admission of that evidence will render the trial unfair or otherwise be detrimental to the administration of justice.

[22] In *Key v Attorney-General, Cape Provincial Division and another* 1996 (4) SA 187 (CC) para 13 the Constitutional Court set out the general approach as to what constitutes a fair trial as follows:

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[2] D T Zeffertt and A P Paizes *The South African Law of Evidence* 2ed (2009), at 716; Jean Campbell 'Illegally obtained evidence: A reappraisal' (1968) 85 *SALJ* at 246.
[3] *Mthembu v S* [2008] ZASCA 51; [2008] 3 All SA 159 (SCA) para 22.
[4] See *S v Magwaza* [2015] ZASCA 36; 2016 (1) SACR 53 para10, and the cases cited therein.
[5] *S v Tandwa & others* [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) para 115.
[6] Ian Currie and Johan de Waal The Bill of Rights Handbook 6 ed (2013) at 309.

'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.' (Footnotes omitted.)

[23] This court in *S v Tandwa*[7] made it clear that s 35(5) does not provide for automatic exclusion of unconstitutionality obtained evidence. In this regard it had this to say (paras 116 to 117):

'[116] . . . .

Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.

[117] In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court's discretion must be exercised "by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to accused persons". Relevant factors include the severity of the rights violation and the

[7] See footnote 5 above.

degree of prejudice, weighted against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant.' (Footnotes omitted)

[24] There is a great similarity between s 35(5) of our Constitution and s 24(2) of the Canadian Charter of Rights and Freedom[8] and it is therefore not surprising that the impact of Canadian law, on South African jurisprudence, in this area has been substantial more especially when it comes to the treatment of derivative evidence. Thus in *S v Pillay* 2004 (2) SACR 419 (SCA) para 89 this Court after a thorough review of Canadian cases dealing with s 24(2) such as *R v Collins* (1987) 28 CRR 122 (SCC); *Thomson Newspapers Ltd et al v Canada (Director of Investigation and Research*, *Restrictive Trade Practices Commission*) *et al* (1990) 47 CRR 1 (SCC) and *R v Burlingham* 28 (1995) CRR (2nd) 244 (SCC) summed up the Canadian position as follows:

'. . . . What emerges from this is that evidence derived (real or derivative evidence) from conscriptive evidence, ie self-incriminating evidence obtained through a violation of a Charter right, will be excluded on grounds of unfairness if it is found that, but for the conscriptive evidence, the derivative evidence would not have been discovered. In the present case the information sourced from the illegal monitoring of accused 10's telephone line, which ultimately led to the discovery of the robbery money in her house, was not conscriptive evidence.'

[25] In *S v Magwaza* 2016 (1) SACR 53 para 15 this court held:

'[15] Although s 35(5) of the Constitution does not direct a court, as does s 24(2) of the Charter, to consider "all the circumstances" in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to be logical that all relevant circumstances should be considered (*Pillay* at 433*h*). *Collins* lists a number of factors to be

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[8] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 24(2) reads:

'(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.'

considered in the determination of whether the admission of evidence will bring the administration of justice into disrepute, such as, for example, the kind of evidence that was obtained; what constitutional right was infringed; was such infringement serious or merely of a technical nature; and would the evidence have been obtained in any event. In *Collins* (at 282) Lamer J reasoned that the concept of disrepute necessarily involves some element of community views, and "thus requires the Judge to refer to what he conceives to be the views of the community at large". *Pillay* (at 433*d* – *e*) accepted that whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which inevitably involves considerations of the interests of the public.'

[26] With these principles in mind, I revert to the facts of the case. In regard to the absence of a search warrant, Govender testified that due to the urgency of the matter, he did not have adequate time to obtain one. He explained that, on 15 May 2000, at about 22h00, he was informed by a police informer that the appellant was implicated in the Klaarwater robbery, and was at his house after he had been away since the robbery. The informer warned that there was a possibility that the appellant would not be at his home the following day. According to the informer the appellant was armed. With this at hand, at about 01h00, Govender and about nine other police officers, including Mbatha, proceeded to the appellant's house and forcefully entered it.

[27] Once they were inside the house, which was a three bedroomed house, Govender proceeded to one of the bedrooms where he found the appellant lying on a bed. He switched the light on. The appellant was alone in the room and his wife and two minor children were in another room, not in the same room, as was suggested by the appellant. It was Govender's evidence that before arresting the appellant, he identified himself and informed the appellant of the purpose for which he was at the appellant's residence. He searched the appellant's room and found a firearm containing rounds of ammunition under his pillow. He alerted Mbatha of his find, and then seized and gave the weapon to Mbatha who had then joined him in the room. Govender thereafter warned the appellant that he was under arrest and informed him of his rights in terms of s 35 of the Constitution before driving away with him.

[28] What gave rise to the pointing out and the confession made at the pointing out, is the interview Govender, assisted by Mbatha had with the appellant at Westmead Murder and Robbery Unit office at 03h00 in the morning of his arrest. Govender's evidence regarding what occurred during the interview and as to what had led to the appellant expressing an intention to do a pointing out, was to the following effect:

'Yes. --- M'Lord, the accused was prepared to proceed with the interview and *that he was prepared to proceed, he did not require any services of any legal representative*. M'Lord, during the course of the interview I put various questions orally to the accused, and Mr Mbatha was also asking him questions. M'Lord, it came to a point that I had to stop the accused from proceeding further as the replies given by him incriminated himself in the offence. It was at that point that I informed him to stop and I said that what has been told to me cannot go further by myself, in that it's inadmissible. However, M'Lord, if he wanted to mention what was said by himself, he could address that, firstly, by making a statement to a Magistrate or that he could mention that to an independent police officer of the rank of Captain and above and, M'Lord, in this regard he could point out certain points to that policeman. The accused understood this, from his reply, and after a while indicated that he was prepared to see a police officer in respect of a pointing out. He did not want to see a Magistrate. M'Lord, this interview with the accused took about 45 minutes.' (Own emphasis.)

I must point out that, according to Mbatha, the interrogation took about an hour or an hour and 15 minutes, not 45 minutes as suggested by Govender.

[29] The following exchange occurred between the trial court and Govender regarding how it came about that the appellant offered to point out certain spots in connection with the offences:

'GALGUT DJP Tell me something, you say in regard to accused No 1 that you told him he could do a pointing out to an independent policeman of sufficient rank? --- That is correct, sir.

So was it your idea that he should do a pointing out? --- No, it was not. What I said – could I explain, M'Lord?

Well, I wanted to ask you because the way you put it I got the impression that you suggested to him that he should do a pointing out. --- No, no, M'Lord. What I …[intervention]

How did it happen? --- What I said to him is that he could make a statement to what he said to a Magistrate or he could say that, what he was saying, to a police officer of sufficient rank or point out certain places to that officer.
Well then, as I understand it, it was you that put the idea into his head to do a pointing out? --- If that's what the Court is saying, M'Lord, yes, I said that to him from the replies he had given me.
Well, let's make no secret of it. What were those replies then?
--- From the accused?
What is bothering me, you've not suggested that he said to you that he wanted to point something out to you. --- If I can explain to the Court, M'Lord.
Yes. --- From the replies of the accused, regarded the places where this offence happened. From that reply I then canvassed the issue regarding a pointing out. The pointing out to an officer is about pointing certain places out. That's what was said.
On that explanation then, it was not a case of him saying to you that he wanted to point something out to you? --- Not to me, no.
What …[intervention]
The question of a pointing out arose because you said to him that, if he wanted to, he could point out whatever to a policeman, an independent policeman? --- That is correct. That is correct.'

[30] Mbatha, who was present when the appellant was interrogated at 03h00 in the morning, testified that during the course of the interrogation the appellant made a number of disclosures which amounted to a confession. His evidence as to what led to the appellant allegedly offering to point out certain spots relating to the offence, however, is not clear. When the trial court asked Mbatha what gave rise to the alleged offer, he said it was because of the questions that were put to him.

[31] The first question is whether the admission of the impugned evidence rendered the trial unfair under s 35(5). This is the first leg of an inquiry under s 35(5). The evidence relating to the discovery of a firearm and one emanating from the pointing out was the only evidence on which the State relied to prove its case against the appellant. The evidence of a firearm came to light as a result of a search the police conducted at the appellant's home. That search was unlawful as it occurred without a search warrant. The explanation

proffered by Govender for only arriving at 01h00 at the appellant's home without a warrant cannot be reasonably possibly true if regard is had to the fact that, already on 12 May 2000, Mbatha, with whom Govender worked closely on the case, had obtained a written statement from a certain Bongani Madlala (Madlala) stating that Sammy Gumede of Portadown Place was involved in the robbery. Mbatha's claim that he did not know that Sammy Gumede referred to in that statement was the appellant cannot be true. In opposing the appellant's application for bail on 11 July 2000 Mbatha relied on Madlala's statement. Portadown Place was, incidentally, the address of the appellant. It is therefore clear, as submitted by the appellant, that Mbatha and Govender were aware of the appellant's alleged involvement in the offence as early as 12 May 2000, but did not disclose this.

[32] On the evidence, I am satisfied that a search warrant ought to have been sought and obtained and there was sufficient time for it to be obtained. The police were not faced with circumstances of urgency or emergency. The illegality of a search is therefore beyond question and that much was conceded by the State. The firearm was obtained by means of the search which because of its illegality violated the appellant's right to privacy.[9] But the fact that the evidence of a firearm was obtained in that manner did not, in my view, affect the fairness of the trial. This is so because the firearm is real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy. The existence of the firearm would have been revealed independently of the infringement of the appellant's right to privacy. Consequently, the fact that the evidence of a firearm was unfairly obtained did not necessarily result in unfairness in the actual trial. I am satisfied therefore that the admission of the evidence of the discovery of the firearm under the pillow did not render the appellant's trial unfair.

[33] The second question is whether the firearm evidence should in any event have been excluded on the ground that its admission was detrimental to

[9] Section 14 of the Constitution.

the administration of justice. This is the second leg of an inquiry under s 35(5) and it involves public policy. In *S v Mphala & another* 1998 (1) SACR 654 (W) at 657f-h (which was quoted with approval by Scott JA in *S v Pillay* para 10, Cloete J formulated the approach to be adopted as follows:

'So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.'

[34] This Court in *Mthembu v S* para 26, stated that public policy involves amongst others 'a consideration of the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term.' As pointed out Govender and Mbatha did not disclose that they were aware of the appellant's alleged involvement in the crime, several days before they unlawfully entered his premises. I agree with the submission of the appellant that where the police deliberately mislead a court in an attempt to justify a serious rights violation, the administration of justice is brought into disrepute.

[35] In any event, in considering the second leg of the s 35(5) inquiry both evidence concerning the firearm and the pointing out must be analysed together as the trial court convicted the appellant on the basis of its finding that the discovery of the firearm and ammunition was corroborated by the evidence of the pointings out and the confession made. There was therefore an inextricable link between the firearm evidence and the pointing out evidence, which was obtained by some degree of co-ercion.

[36] The appellant's right to privacy and the right against self-incrimination were flagrantly violated by the police during the investigation. Following upon an illegal search at his home the appellant was interrogated by the police officers including Govender and Mbatha at their offices. This led to the

appellant allegedly offering to do a pointing out. As in the case of Magwaza,[10] the evidence of Govender and Mbatha of what transpired from the time of the appellant's arrest until he arrived at a confessing state of mind was unclear and far from satisfactory. The appellant's version was that the pointing out was not free and voluntary. The appellant alleged that he was severely tortured by the police during the course of the interrogation and to save his life, he had to lie about the money by saying that it was at his father's house. It is common cause that the police took the appellant to his father's house in Chesterville though they denied that they did so for the reasons advanced by the appellant. His father corroborated the appellant when testifying that the reason why the police took the appellant to his home was in order to conduct a search of those premises.

[37] Govender and Mbatha contradicted each other on the duration of interrogation. Govender said it lasted about 45 minutes while Mbatha said it lasted about an hour or an hour and 15 minutes. This contradiction undermined the reliability and integrity of Govender and Mbatha's evidence concerning what it was that led to the appellant wanting to do a pointing out of the crime scene and confessing to his participation in the robbery. In addition, I find Govender's evidence implausible that when he asked the appellant whether he was involved in the commission of the crime, the appellant simply answered 'yes' without any form of co-ercion being applied to the appellant.

[38] The police appeared to have been over zealous in conducting their investigation and by so doing, violated the appellant's constitutional rights. They entered the appellant's house by forcing open the front door at 01h00 in the morning of 16 May 2000. At about 03h00 they started interrogating him at their office in Westmead. According to Govender by 04h00 of the same morning the appellant was ready to confess to the crime and to point out to the police the scene of the crime. At about 11h00 Captain Van Rensburg was approached to conduct a pointing out with the appellant and he began a pre-

[10] Supra para 19.

pointing out interview with the appellant at 13h30. The pointing out process was finalised at 14h40.

[39] As pointed out above, the appellant's s 35 rights were read out to him as set out in the form headed 'Section 35 of Constitution Arrested, Detained and Accused Persons' which was an exhibit at the trial. This form in para 1(b)(ii) records the right of an arrested person to be informed of the consequences of not remaining silent. Neither Govender nor Mbatha stated that when this form was read out to the appellant, this was explained to him. Although Govender maintained that he had explained this to the appellant when he was arrested, Mbatha who was present, simply said Govender had advised the appellant of his right to remain silent. The appellant's right to remain silent and his right to be protected against self-incrimination were not protected. The investigation was conducted with haste and was completed almost within twelve hours of his arrest. In my view, given the serious nature of the allegations against the appellant, Govender and/or Mbatha should have informed him of the consequences of not remaining silent.

[40] When regard is had to the manner in which Govender and Mbatha sought to justify their failure to obtain a search warrant, followed by their inadequate and in certain respects contradictory explanation of how the appellant's rights were explained to him on arrest and before interrogation, and why after a very short and straightforward interrogation at 3am, the appellant admitted his guilt and wished to do a pointing out, but not tell his story to a magistrate, it is clear he must have been subjected to a considerable degree of co-ercion, such that his conduct was neither free nor voluntary.

[41] In my view, having regard to all of the circumstances of this case, the admission of the evidence of the discovery of the firearm and the pointing out evidence, was detrimental to the administration of justice under s 35(5) and it ought to have been excluded. Public policy requires the police to observe and respect the law in the conduct of their investigation. Police officers are not above the law and must conduct their investigations within the parameters of

the law, which includes the Constitution. As the discovery of a firearm and the pointing out and confession made at the pointing out were the sole evidence against the appellant, and ought not to have been admitted, he should not have been convicted. Therefore the appeal must succeed.

[42] In the result I make the following order:

1 The appeal succeeds and the convictions and sentences imposed pursuant thereto are set aside.

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D H ZONDI
JUDGE OF APPEAL

APPEARANCES:

For appellant:	J E Howse
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