THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not Reportable

Case No: 1327/2016

In the matter between:

M QHINGA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Qhinga v State* (1327/2016) [2017] ZASCA 149 (15 November 2017)

Coram: Leach, Seriti and Saldulker JJA and Plasket and Mbatha AJJA

Heard: 2 November 2017

Delivered:

Summary: Evidence – pointing-out – trial-within-a trial – after pointing out ruled admissible, no evidence in record to prove contents of pointing-out – such evidence either not led or, if led, lost and not capable of being reconstructed – no admissible evidence implicating appellant in commission of offences – convictions and sentences set aside.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Bhisho (Pakade, Schoeman and Roberson JJ sitting as court of appeal):

1 The appeal succeeds, and the appellant's convictions and sentences are set aside.

2 Paragraphs 2 and 3 of the order of the court a quo are accordingly altered to read as follows:

'2. That the appeal in respect of the first, third and fourth appellants is allowed and their convictions and sentences are set aside.

3. That the appeal in respect of the second, fifth and sixth appellants is dismissed.'

REASONS FOR JUDGMENT

Plasket AJA (Leach, Seriti and Saldulker JJA and Mbatha AJA concurring)

[1] At the conclusion of the hearing of this appeal we made an order in the following terms:

1 The appeal succeeds, and the appellant's convictions and sentences are set aside.

2 Paragraphs 2 and 3 of the order of the court a quo are accordingly altered to read as follows:

'2. That the appeal in respect of the first, third and fourth appellants is allowed and their convictions and sentences are set aside.

3. That the appeal in respect of the second, fifth and sixth appellants is dismissed.'

We undertook to furnish our reasons in due course. These are those reasons.

Background

[2] On 12 July 2006, a group of armed men entered the precinct of a community hall in Newlands near East London where social grants were being paid by employees of All Pay Payment Services. The men, acting in the furtherance of a common purpose, robbed a security guard of his firearm and 30 rounds of ammunition; shot and injured a second security guard and robbed him of his firearm and 18 rounds of ammunition; robbed an employee of All Pay Payment Services of an amount of money intended for the payment of social grants; robbed a person of his vehicle, which was used to flee the scene; and later fired shots at a policeman.

[3] Arising from these events, seven men, including the appellant (who was accused 1), were indicted in the Eastern Cape Local Division of the High Court, Bhisho on a total of ten charges, the last four of which are irrelevant to this appeal and will not be discussed. The charges of relevance were four counts of robbery with aggravating circumstances and two counts of attempted murder. At the conclusion of a lengthy trial before Dhlodhlo ADJP, one of the seven was acquitted of all charges and the remaining six, including the appellant, were convicted of four counts of robbery with aggravating circumstances and two counts of attempted murder. The six accused were sentenced to lengthy terms of imprisonment – an effective 28 years imprisonment in the cases of five of them (including the appellant), and an effective 22 years imprisonment in respect of one of them.

[4] All six men applied for leave to appeal against both conviction and sentence. That was refused by Dhlodhlo ADJP. They petitioned this court but their petition was dismissed. They then applied to the Constitutional Court to be granted leave to appeal to a full court of the Eastern Cape Local Division of the High Court, Bhisho or for the matter to be remitted to this court for a fresh consideration of their petition. Their application succeeded and the petition was remitted to this court,[1] which granted the appellants leave to appeal to the full court of the Eastern Cape High Court, Bhisho against both conviction and sentence.

[5] The full court set aside the second attempted murder conviction in respect of all six appellants. It also set aside the convictions of two of the appellants. It

[1] See *S v Qhina & others* 2011 (2) SACR 378 (CC).

confirmed the convictions of a further three of the accused but it split in respect of the appellant.

[6] The only evidence against the appellant was a pointing-out that amounted to a confession as well as a further confession that was subsequently made. Pakade J, with Roberson J concurring, held that while the pointing-out had been correctly admitted by the trial court, the subsequent confession had not been. The pointing-out was, in the view of the majority, sufficient for a conviction in respect of the first five counts.

[7] Schoeman J, dissenting, was of the view that the pointing-out had been made in circumstances that violated the appellant's fair trial rights, had not been made freely and voluntarily and was thus inadmissible. She would have set aside the appellant's convictions in their entirety.

[8] The appellant and two of his co-accused petitioned this court for special leave to appeal. The appellant's petition was granted but those of the other two men were refused.

The issues

[9] Two issues arise. The first is whether the content of the appellant's pointing-out was proved and the second is whether it ought to have been admitted in the first place. I shall deal with each briefly.

[10] After the trial-within-a-trial in respect of the appellant's pointing-out and later confession, Dhlodhlo ADJP made rulings admitting both. The record reflects that the matter was postponed to the next day at the request of the State advocate so that witnesses 'can come and place this evidence on record'.

[11] The pointing-out was conducted by Superintendent Sonwabile Nkosiyana. He had testified in the trial-within-a-trial. Despite what the State advocate stated, however, there is no indication in the reduced record agreed to by the parties of him having testified after the ruling had been made that the pointing-out was admissible.

[12] When this problem was raised with the parties, Ms Crouse who, together with Mr Moolman, appeared for the appellant, informed the court that Superintendent Nkosiyana's evidence was also nowhere to be found in the full record. That was accepted by Mr Willemse, who appeared for the State.

[13] Parts of the record had been lost and had been reconstructed. It was accepted by the parties that no purpose would be served in making any further attempt to reconstruct the record in the hope that Superintendent Nkosiyana's evidence may be found.

[14] The result is this. Either Superintendent Nkosiyana never gave evidence to prove the content of the pointing-out, or his evidence is lost and cannot be reconstructed. In either event, there is simply no evidence proving the pointing-out. It is thus not admissible against the appellant. That being so, there is no evidence whatsoever implicating the appellant in the commission of the offences of which he had been convicted. For that reason, we made the order upholding his appeal and setting aside his convictions and the sentences imposed on him.

[15] Although that finding effectively disposes of this appeal, the conduct of the police calls for comment.

[16] The facts leading to the appellant making the pointing-out and the subsequent confession were succinctly set out by Schoeman J in her dissenting judgment as follows:[2]

'The first appellant was arrested at 06:00 on 1 August 2006. He was not taken to a police station but to the offices of the Serious and Violent Crime Unit at an army base. He was detained in a motor vehicle until 15:00 and only taken to police cells about 12 hours after his arrest. He was removed from the police cells at 03:30, returned to the cells at 05:10 and again booked out at 07:05. He then made a pointing out. He was taken to court, not within 48 hours as required, but on 4 August 2006. The first appellant indicated in court, on his first appearance that he required legal representation. In spite of that, after his appearance in court, the first appellant was taken to a police officer where he made a confession.'

[2] Para 8.

[17] Schoeman J was of the view that all of this was testimony to a most unsatisfactory state of affairs and that the 'explanation why he was removed in the early hours of the morning ie for his own safety, does not hold water'.[3] In addition to the facts set out by Schoeman J, the following must be added: first, the appellant stated that he was denied food during the day. While the police witnesses said that he was given some food, it is apparent from the record that if he was fed, it would have been very little; secondly, after he had been held captive in the motor vehicle, he was subjected to an interrogation before eventually being taken to the cells at a police station.

[18] The State bore the onus of proving that the pointing-out was freely and voluntarily done by the accused without undue influence having been brought to bear on him. The facts that I have outlined above are strongly indicative of pressure being placed on the appellant by the police, from the moment of his arrest, to forego his right to silence and to create an environment conducive to him incriminating himself.

[19] This case highlights precisely how the police should not conduct themselves when investigating offences. In a constitutional democracy founded on the rule of law and values of human dignity, equality and the advancement of human rights and freedoms,[4] such aberrant conduct is beyond the pale and cannot be tolerated. The policemen implicated in this wrongdoing acted in defiance of the Constitution and the South African Police Service Act 68 of 1995. Section 13(1) of the Act places an obligation on policemen to exercise their lawfully imposed powers, to perform their lawfully imposed duties and comply with their lawfully imposed functions subject to the Constitution and 'with due regard to the fundamental rights of every person'.

[20] The facts of this case leave one with grave doubts as to the fairness of the appellant's trial. But it is unnecessary to decide whether Schoeman J was correct in her view that the conviction could not stand for that reason, as there was no admissible evidence against the appellant.

---

[3] Para 9.
[4] Constitution, s 1.

_____

C Plasket

Acting Judge of Appeal

APPEARANCES

For the appellant:	L Crouse and M Moolman
Instructed by:	Legal Aid South Africa Port Elizabeth and Bloemfontein
For the respondent:	D Willemse
Instructed by:	Director of Public Prosecutions, Bhisho and Bloemfontein