**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**
Case No: 1180/2016

In the matter between:

**LEFU JANTJIE BAKANE** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

**Neutral citation:** *Bakane v The State* (1180/2016) [2017] ZASCA 182 (5 December 2017)

**Coram:** Tshiqi, Majiedt, Petse and Mocumie JJA and Makgoka AJA

**Heard:** 2 November 2017

**Delivered:** 5 December 2017

**Summary**: Criminal law and procedure – evidence obtained contrary to the provisions of s 35 of the Constitution – appellant assaulted - trial rendered unfair - onus on the State to prove that a confession or admission was made voluntarily - no admissible incriminating evidence against the appellant – convictions and sentences set aside.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (Preller, Khumalo JJ concurring and Manamela J dissenting sitting as a full court):

1. The appeal is upheld.

2. The order of the Full Court is set aside and substituted with the following:

'The appeal is upheld. The convictions and sentences are set aside and substituted with the following:

"The accused is found not guilty and discharged on both counts."'

## JUDGMENT

**Mocumie JA (Tshiqi, Majiedt, Petse JJA and Makgoka AJA concurring):**

[1] During the morning of 23 June 2004, Mr Johannes Albertus Maré (the deceased) of Timsrand, Pretoria, was found dead in his house, strangled with a piece of curtain. The post-mortem report reflected the deceased's date of death as 22 June 2004. On the day of the discovery of the deceased's body, 23 June 2004, the police recovered a few items in the veld not far from the deceased's house. These items included: four television remote controls which they believed were removed from the deceased's house when he was attacked; a woollen cap and a jacket as well as a knife. The police believed that the deceased was also robbed of his money as he ran a shop on his premises. On the same day, the appellant and his four co-accused were arrested.

[2] The appellant and his co-accused were charged with and convicted in the Gauteng Division of the High Court, Pretoria by Ranchod J, sitting with an assessor (the trial court), on count 1 on murder and on count 2 on robbery with aggravating circumstances. On count 1 the appellant was sentenced to life imprisonment and on count 2 he was sentenced to 15 years' imprisonment and the sentences were ordered to run concurrently. Dissatisfied with the outcome, with leave of the trial court the appellant appealed to the full court against both the convictions and sentences. The majority in the full court (Preller and Khumalo JJ) dismissed his appeal. Manamela J dissented and held that he would have upheld the appeal. The appellant appeals against the convictions and sentences with special leave of this Court.

[3] In the trial court the appellant and his co-accused were legally represented. They pleaded not guilty to both counts and elected to exercise their right to remain silent. During the trial the defence objected to the admission of the statements purportedly made by the appellant and his co-accused. With reference to the appellant, the defence objected on the basis that his statement, exhibit H, was not made by the appellant. The defence claimed that the police invented the contents and forced the appellant to sign the statement without explaining the contents thereof. The appellant, it was argued, only answered three questions posed to him by the police. It was further disputed that the police explained the appellant's constitutional rights to him, including the right to legal representation and not to incriminate himself. This necessitated a trial-within-a-trial.

[4] During the trial-within-a-trial the appellant testified that the police found him at his girlfriend's house on the morning of 23 June 2014. He was assaulted by the police and forced to point out his friends, which he did, whereafter all five of them were assaulted and arrested. After searching his girlfriend's place of residence, the police found no incriminating evidence. Thereafter he was taken to point out the deceased's house which he did. On his return to the police station, he was made to sign documents. The appellant testified that he was not aware of what was written in those documents. He denied that his statement to the police, exhibit H, was made voluntarily. Instead, he alleged that exhibit H was concocted by the police. The appellant contended that he

was not informed of his constitutional rights, which included his right to legal representation nor was he provided with a copy of the Notice of Rights.

[5] Despite the trial court finding that '…some slapping and rough handling took place. The slapping could be classified as assault but not torture. . . ', it surprisingly admitted exhibit H on the basis that it was made voluntarily. It held that its admission was in the interest of justice and that not admitting it would bring the law into disrepute.

[6] In his defence the appellant raised an alibi that when the offences were committed around 18h00 or 18h15 (the time one of the neighbours said he saw five young men run out of the deceased's house); he was not at the deceased's house as he and his co-accused only finished work at 18h00. The appellant and his co-accused worked at a place called Why Not Wood. However the appellant did not call his employer to verify his alibi, as he was told by the police while in custody, that his employer had relocated and could not be traced.

[7] In convicting the appellant, the trial court accepted exhibit H and the admissions contained therein to be true. It rejected the appellant's alibi defence and held that if his alibi were true, the appellant would have informed the police upon his arrest and the police and the prosecution would have been given sufficient opportunity to confirm it. Instead, the appellant and his co-accused informed the police that they were unemployed at the time. I shall revert to the correctness of this finding later in the judgment.

[8] In this Court, counsel for the appellant submitted that the police violated the appellant's right to remain silent when they proceeded to ask him questions despite his choice not to make any statement. In addition, the police failed to explain his constitutional rights, including his right not to incriminate himself. This was evidenced by the fact that the police could not produce the Notice of Rights served on the appellant. Counsel for the State submitted that the trial court was enjoined to admit exhibit H. He contended that it was not the appellant's case that the alleged assault on him coerced

or influenced him into making the statement because, on the appellant's version, he was not the author of the statement.

[9] Thus the main issue on appeal is whether it was correct for the trial court to have admitted into evidence the appellant's statement and to convict the appellant on it.

[10] The approach which courts adopted prior to the advent of the interim Constitution with regard to the admission of confessions and extra curial admissions was discarded when the Constitution came into force on 27 April 1994.[1] Since that date the Constitution has required criminal trials to be conducted with notions of basic fairness and justice.[2] The admission of confessions and admissions is codified by ss 217 and 219 of the Criminal Procedure Act, 51 of 1977 (the CPA). The admissibility of an extra curial admission is governed by s 219A which provides:

'Evidence . . . in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence . . .'

[11] Section 219A, is clearly peremptory in that evidence of an involuntary admission is inadmissible and linguistically it permits of no exception.[3] It is trite that when the question is raised whether evidence should be excluded, the State bears the onus to prove the admissibility of the evidence on a balance of probabilities. In other words the State bears the onus to prove that the statement made by the appellant was made freely and voluntarily.[4] Section 252A (6) of the CPA reads as follows:

'If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the

[1] *S v Gumede* [2016] ZASCA 148; [2016] 4 All SA 692 (SCA); 2017 (1) SACR 253 (SCA) para 19.
[2] *S v Zuma & others* 1995 (1) SACR 568 (CC); 1995 (4) BCLR 401 para 16.
[3] *S v January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 806-807.
[4] *S v Yolelo* 1981(1) SA 1002(A) at 1009; *S v Kotze* 2010 (1) SACR 100 (SCA) para 20.

accused is not represented the court shall raise the question of the admissibility of the evidence.'

[12] Section 35(5) of the Constitution specifically provides that '[e]vidence 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.' In *S v Magwaza*[5] this Court referred to the Canadian Charter as well as earlier judgments of this Court and stated:

'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*)[6]. *Collins*[7] lists a number of factors to be 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.'

[13] With these principles in mind, I revert to the facts of the case and more specifically to exhibit H. The questions posed by Captain J M Spies and the answers allegedly provided by the appellant contained in Annexure B of Exhibit H are as follows:

Do you know the address of the deceased in this case?

I don't know the address particulars but I knew where the address is as I used to stay there.

When exactly did you stay at the deceased's address?

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**5** *S v Magwaza* [2015] ZASCA 36; [2015] 2 All SA 280 (SCA); 2016 (1) SACR 53 (SCA) para 15.
6 *S v Pillay & others* 2004 (2) SACR 419 (SCA) paras 9 and 11.
7 *Collins v The Queen* (1987) 38 DLR (4th) 508 (SCC); [1987] 1 SCR 265; 28 CRR 122.

I am not exactly certain. It was around February or March 2004. It was in a shanty on the plot.

Do you know the deceased Mr Maré?

Yes I know the deceased I have already said that I used to stay on the premises. I used to buy things from his shop.

Were you on the premises of the deceased on the night of 22 June 2004?

Yes I was there at 18h15.

What were you doing there?

I'd gone to look for money

Whose and what money?

It was the deceased's money which we wanted to take.

. . . .

What did you do at the house?

We killed the white man (the owner) and I took the cigarettes and money.

How much money did you take?

I only got one hundred rand.

Who is 'we' that you are talking about?

It's the person known as One One (Amos Khoza), Modise (Elias Serumola), Sello Moima and Sipho Mhlango.' (My own translation).

[14] Captain Spies, who questioned the appellant and completed exhibit H, admitted during cross-examination that he did not complete Annexure A which is the portion where a suspect would usually make the statement after the preceding preliminary questions. This was not done. The trial court found that these questions and answers accorded with Captain Spies' evidence that the appellant elected not to make a statement but merely to answer questions. As to whether the appellant indicated that he wanted legal representation, Captain Spies stated that the appellant informed him that he would seek legal representation during the trial.

[15] In my view, what had occurred here flies in the face of what the right not to incriminate oneself entails and it went diametrically against the appellant's wishes to have a legal representative present. The duty to explain an accused person's constitutional rights is even more important during the pre-trial processes as it is at any other stage[8] because once in court, the responsibility shifts to the trial court to do so.

[16] The State's reliance on exhibit H had further shortcomings. According to annexure B the appellant, on being questioned what he had gone to do at the deceased's place of residence, allegedly said that he went to look for money, that they killed the white man and he took cigarettes and money. He then referred to 'they' as: 'One-one [Amos Khoza], Modise [Elias Serumola], Sello Moima and Sipho Mhlango.'

[17] From the answers the appellant purportedly provided, there is no proof of the requisite elements of the crimes of murder and robbery. There is a striking lack of detail to: the time the offences were committed, how the deceased died or at what time, .why the appellant and his co-accused were arrested and as to the role of the appellant, if any, during the commission of any of the offences.

[18] A careful reading of Exhibit H reveals that the appellant was arrested around 20h00. Exhibit H was produced at 08h00 the next morning. Even if it were accepted that the appellant said something to the police, the conclusion is unavoidable that there was persistent interrogation which culminated in admissions and pointings out within 24 hours after the arrest. The trial court should have been alive to this and should have taken this into account in determining whether exhibit H was made voluntarily or under any form of compulsion or coercion.

[19] In *S v Tandwa*[9] this court stated the following in paras 118 and 119:

' [T]hough admitting evidence that renders the trial unfair will always be detrimental to the administration of justice, there may be cases when the trial will not be rendered unfair, but

[8] See *R v Brydges* [1990] 1 SCR 190, 1990 CanLII 123 (SCC); 46 CRR 236 at line 12-19.
[9] *S v Tandwa & others 2008 (1) SACR 613 (SCA)*.

admitting the impugned evidence will nevertheless damage the administration of justice. Central in this inquiry is the public interest: 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. Over emphasis 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.

Of course the public interest in combating crime is substantial. But in *S v Pillay*,[10] Scott JA – who dissented on the facts of that case, which involved evidence uncovered as a result of an unauthorised search (the warrant having been obtained on the basis of erroneous statements) – pointed out that the admission of derivative evidence obtained in circumstances involving some form of compulsion, or as a result of torture, 'however relevant and vital for ascertaining the truth, would be undeniably detrimental to the administration of justice'.

[20] In this case, it is common cause that the police assaulted the appellant and obtained a statement from him despite his election not to make a statement. And the trial court accepted that there was 'some slapping and rough handling' and that this amounted to an 'assault but not to torture'. It appears that the appellant was hoodwinked into making a statement which he consciously did not want to make. The conclusion is ineluctable that he did not know what was written in exhibit H until he was challenged on its contents in court, as he maintained throughout the trial. This is given credence by what Senior Inspector Mashabela admitted during cross examination '. . . Spies did not write what he [Mashabela] was interpreting. . .' Thus the police violated a number of rights, including the right not to incriminate oneself,[11] the right to legal representation,[12] the right 'not to be compelled to make any confession or admission that could be used in evidence' against him.[13]

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[10] *Pillay fn 7* paras 9 and 11.
[11] Section 35(1) *(a) (b)* (i) and (ii).
[12] Section 35(2) *(b); See S v Marx & another* 1996 (2) SACR 140 (W) at 149G.
[13] Section 35 (1) *(c); See S v Melani* 1996 (1) SACR 335 (E) at 348I.

[21] The State's woes do not end there. It also failed to present evidence to prove that the jacket, woollen cap and knife found in the veld next to the deceased's house, belonged to the appellant. It seems that no tests were conducted on these items in order to link them to the appellant and his co-accused, especially the appellant who was arrested on the basis that he was seen wearing the jacket and woollen cap from time to time. Furthermore, despite the fact that Inspector Sibiya stated in his evidence that he was present at the scene and took photographs and thereafter left the scene to the forensic personnel – there is no evidence by the State regarding any finger prints that may have been lifted from the scene or from the knife found in the veld.

[22] This brings me to the question whether the appellant's conviction on both counts can stand, absent any admission contained in exhibit H purportedly made by him in relation to his role in the commission of the offences. In my view and in the light of the evidence of the appellant, he did not contradict himself during his testimony. Even in cross-examination he was consistent in his version that he did not kill the deceased. He was supported in his version by the evidence of one of the witnesses that the State elected not to call, one Thebeli, to the effect that he saw about five male persons run out of the deceased's house at around 18h00. Although he could not identify these five males, he was certain that the appellant was not amongst them as he would have recognised him by his body build (height and complexion). The appellant was also corroborated on his version by his girlfriend that the police assaulted him upon his arrest.

[23] To bolster his case, the appellant put forth an *alibi* defence. There was no onus on the appellant to prove his alibi. The trial court erred in holding that he did not inform the police about this when he was arrested. According to Captain Smit who was involved in the aborted pointing out by the appellant, the appellant did in fact give his work address as Why Not Wood, Laezonia. The fact that he did not disclose this defence at the commencement of the trial did not make the onus which rested on the State to disprove the defence, any lesser.

[24] In a criminal trial, in order to determine the guilt of an accused person, a trial court must weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.[14] The trial court found that the State proved that the appellant and his co-accused acted in pursuance of a conspiracy to commit all the offences. On the evidence and absent exhibit H, the State did not prove the appellant's commission of any of the offences.

[25] In conclusion, it is clear that the trial court erred in admitting exhibit H and convicting the appellant on the basis thereof in the absence of any cogent evidence. In line with the provisions of s 35 of the Constitution, once the trial court found that the appellant was assaulted, it should have excluded exhibit H.[15] . Consequently, the trial court erred in its approach to the admission of exhibit H. The principle of bringing the law into disrepute is a material consideration when a court considers the exclusion of illegally obtained evidence and not its admission. The conclusion is compelling that, absent the admissions, there was no evidence on which the trial court could convict the appellant. The appeal therefore ought to succeed.

[26] It is of great concern that this case was compromised from the onset by the manner in which the police investigated it. The breach of a number of constitutional rights in this case which is supposedly common knowledge in the police force since the advent of our democracy; is still happening. It is r more important now than ever, taking into account the violent history of our country, for trial courts to be more vigilant to uphold the rights enshrined in the Bill of Rights at the risk of abomination from society.

[14] See *S v Van Aswegen* 2001 (2) SACR 97 (SCA); *S v Chabalala* 2003 (1) SACR 134 (A) paras 14-15;
[15] *S v Mthembu* 2008 (2) SACR 407 SCA para 23.

In *Tandwa*[16] this court grasped the importance of sending a reminder when it stated that (para 21):

'[I]n this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order.'

[27] In the result, the following order is granted.

1. The appeal is upheld.

2. The order of the Full Court is set aside and substituted with the following:

'The appeal is upheld. The convictions and sentences are set aside and substituted with the following:

"The accused is found not guilty and discharged on both counts.'"

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**BC Mocumie**
**Judge of Appeal**

[16] *Tandwa* fn 7.

APPEARANCES:

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|---|---|
| For the Appellant: | LA van Wyk |
| Instructed by: | Justice Centre, Pretoria |
| | Justice Centre, Bloemfontein |
| | |
| For the Respondent: | PW Coetzer |
| Instructed by: | Director of Public Protections, Pretoria |
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