THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1148/2016

In the matter between:

NNDWAMBI MUDAU **FIRST APPELLANT**

TSHIVHANGWALO RATHOGWA MUDAU **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mudau v The State* (1148/2016) ZASCA 34 (29 March 2017)

Coram: Tshiqi, Petse and Mbha JJA and Fourie and Mbatha AJJA

Heard: 15 February 2017

Delivered: 29 March 2017

Summary: Appeal against convictions and sentence: admissibility of confessions: misdirections by trial court, right to a fair trial infringed: appeal upheld.

ORDER

On appeal from: Limpopo Local Division of the High court, Thohoyandou (Makgoba AJ sitting as court of first instance):

1 The appeal against the convictions is upheld.

2 The convictions of both appellants on charges of murder, assault with intent to commit grievous bodily harm and robbery with aggravating circumstances are set aside.

3 The order of the trial court is set aside in its entirety and replaced with the following:

'Both accused are found not guilty and discharged on all the charges.'

JUDGMENT

Mbha JA (Tshiqi, Petse JJA and Fourie and Mbatha AJJA concurring):

[1] The appellants were charged in the Limpopo Local Division of the High Court, Thohoyandou (Makgoba AJ), hereinafter referred to as the high court, with murder, attempted murder and robbery committed with aggravating circumstances. On the first count it was alleged that the appellants, acting in common purpose, unlawfully and intentionally killed Mr Robert Mandiwana. On the second count it was alleged that they attempted to kill Mr Raymond Lishivha, and on the third count it was alleged that they assaulted Mr Lishivha and robbed him of R55.

[2] On 14 July 2003 the appellants were convicted of murder, assault with intent to cause grievous bodily harm and robbery committed with aggravating circumstances. They were sentenced to life imprisonment on the count of murder and 15 years' imprisonment on the counts of assault with intent to commit grievous bodily harm and robbery with aggravating circumstances, which were taken together for the purpose of sentencing. The appellants appeal against both conviction and sentence. Leave to appeal was granted by the high court on 6 December 2012. It is pertinent at this juncture to note that the appellants were initially charged with a third accused whose conviction and sentence were subsequently set aside by this court on 1 April 2009.

[3] Two witnesses testified on behalf of the State, namely Mr Raymond Lishivha and Ms Portia Budeli. They stated that they were inside a shack, which was used as a workshop for Mr Lishivha's carpentry work, together with the deceased. Two unknown males, one of them being tall and the other one short, entered the shack. The shorter of the two males who was carrying a firearm fired two gunshots, one of which hit and killed the deceased. The taller male person, who was carrying a knife at the time, searched Mr Lishivha and took R55 from his pocket. He thereafter stabbed Mr Lishivha three times in his back and shoulders. Thereafter the two assailants ran away from the scene.

[4] It is common cause that neither witness could identify the assailants. The State then sought to hand in as evidence confessions of both appellants and a written statement made by the third accused. The defence objected to the admissibility of the confessions on the basis that they did not comply with the provisions of s 217 of the

Criminal Procedure Act 51 of 1977 (the CPA) in that the appellants were threatened, assaulted and forced to make the statements, that these statements were not made freely and voluntarily and, importantly, that the preamble forms of the confessions were not completed in full. This then necessitated the holding of a trial within a trial in order to determine the admissibility of the two confessions and the statement made by the appellants and the third accused respectively.

[5] Both appellants and their co-accused were required to testify first in the trial within a trial. Thereafter the State called as witnesses, Mr Nditsheni Baldwing Matamela, the magistrate who recorded the appellants' confessions on 2 December 2002 and 9 December 2002 respectively, the investigating officer Inspector Munyai and another police officer, Inspector Musina. At the conclusion of the trial within a trial, the court found that the appellants (and their co-accused) were not impressive witnesses and rejected their evidence regarding the alleged incidents of assault. It concluded that the accuseds' version that they were induced to make the statements could not be accepted. It is common cause that both the appellants were convicted purely on the basis of their confessions.

[6] The gist of the appeal against conviction, in respect of the first appellant, is briefly that his statement in terms of s 217 of the CPA does not amount to a confession because although he admits to having been at the scene at all relevant times, he never implicated himself in any way and in fact exonerated himself from any guilt.

Furthermore, the trial court impermissibly convicted him on the basis of the confession of the second appellant.

[7] In so far as the second appellant is concerned, his conviction is challenged on the basis that his confession should not have been admitted because, it was not freely and voluntarily made and he was unduly influenced into making the confession in that he was told that a confession would ‘allow the matter to proceed quickly’.

[8] The basis of the appeal against sentence is briefly that the trial court over-emphasised the seriousness of the offence and the interests of society over the personal circumstances of the appellants. Furthermore, the trial court ought to have found that there were substantial and compelling circumstances that warranted a deviation from the prescribed minimum sentence of life imprisonment.

[9] As the appellants contend that their confessions were wrongly admitted into evidence, I deem it prudent to traverse, briefly, some of the relevant salient principles governing confessions. The admissibility of evidence contained in a confession is governed by s 217(1) of the CPA, which provides that such a confession shall be admissible into evidence if it is proved to have been freely and voluntarily made by a person in his sound and sober senses and without having been unduly influenced thereto.

[10] It is trite that a confession must conform to the rigidly defined requirements specified in s 217. Failure to satisfy any of the requirements will render it impermissible to tender the statement as a confession. In *R v Becker*[1] it was said that a confession can only mean an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law. It is therefore an extra-curial admission of all the elements of the offence charged. Similarly in *R v Hans Veren & others,*[2] it was said that the accused must in effect have said 'I am the man who committed the crime'. Thus a statement will not be regarded as a confession where it is made with an exculpatory intent. The decisive factor is whether the accused has admitted all the essential elements of the offence.

[11] A related provision is s 219 of the CPA which provides that '[N]o confession made by any person shall be admissible as evidence against another person'. A confession made by one accused should be excluded when determining the guilt or otherwise of his or her co-accused.[3]

[12] Whilst the admissibility of a confession is governed, in large measure, by the provisions of s 217, it has become increasingly apparent that the question of admissibility has significant constitutional implications. Section 35(5) of the Constitution provides that:

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[1] *R v Becker* 1929 AD 167 at 171.
[2] *R v Hans Veren & others* 1918 TPD 218 at 221.
[3] *S v Molimi* 2008 (2) SACR 76 (CC) para 30.

'[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.'

Examples that immediately come to mind are the duty to inform the accused of various important constitutional rights, such as the right not to be compelled into making any confession or admission that could be used against a person,[4] the right to remain silent, as well as to be informed promptly of that right, the consequences of not remaining silent,[5] the right to choose and to consult with a legal practitioner in a language that he or she understands.[6]

[13] There are accordingly two separate but related inquires that have to be made in determining the admissibility of a confession namely, whether the statutory requirements referred to above have been satisfied, and whether in all the circumstances the accused has had a fair trial.[7] As can be seen, the Constitution has significantly widened the grounds upon which the admissibility of a confession or admission may be challenged in criminal proceedings.

[14] A confession made to and reduced to writing by a magistrate is, upon its mere production, admissible in evidence provided that the requirements of s 217 are satisfied. This means that a magistrate should ensure that the confession conforms to the prescripts set out in the Constitution. Even before the advent of the Constitution, cases are legion that emphasised the importance of informing the accused of his constitutional

[4] Section 35(1)(*c*).
[5] Section 35(1)(*a*) and (*b*).
[6] Section 35 (4).
[7] *S v Chauke* [2012] ZASCA 143 para 19.

rights to legal representation and the right to silence at every important stage during the recording of a confession. Thus in *S v Mpetha & others*[8] the court said at 408 E-H:

'Before the presumption comes into operation it must appear "from the document in which the confession is contained" that such confession was made freely and voluntarily, etc. Normally no confession of itself would refer to questions of voluntariness or undue influence. A person making a confession is most unlikely to volunteer the fact that he is confessing freely and voluntarily, that he is in his sound and sober senses and that he has not been unduly influenced to make such confession. It is manifest therefore that implicit in the whole procedure envisaged by the section is a questioning by the magistrate of the person confessing. These questions as well as the answers must be recorded for it to be able to appear from the document that the confession was made under the required conditions of voluntariness, etc. This, of course, is also in accordance with long-standing practice. It is well known that over a period of many years departmental instructions and the decisions of the Courts have built up a series of guidelines designed to ensure that confessions are in fact freely and voluntarily made without the exercise of undue influence ….'

These rights have since the advent of the Constitution been entrenched in s 35.

[15] Contrary to what was stated in *Mpetha*, the recording of the confessions of both appellants are replete with omissions, incoherent and contradictory recording of answers by the appellants to questions, and serious non-adherence to some of the fundamental principles governing confessions referred to above. I start with the confession of the first appellant Mr Nndwambi Mudau.

[8] *S v Mpetha & others* 1982 (2) SA 406 (C).

[16] Paragraph two of the form, setting out the accused's constitutional right to remain silent and the right to legal representation, was left blank and not completed. Similarly, paragraph three of the form which questions whether the deponent was in his sound and sober senses and paragraph four which enquires whether the accused wished to make a statement notwithstanding what had been explained to him, were also left blank. Although the magistrate testified that he could still remember that the first appellant answered in the affirmative to these questions, the correctness of his evidence in this regard is seriously put in doubt as, when he was asked about the answer given in relation to paragraph six which was also not completed, and how it came about that the first appellant was brought to make a confession, he stated that he could not remember the answer that was given. This must be viewed against the backdrop of the magistrate's testimony that on the day in question he was extremely busy as he was manning two courts on his own.

[17] Paragraph nine of the form was also left blank. The magistrate's viva voce evidence when questioned on this was so convoluted and contradictory, that on this ground alone this confession ought to have been excluded. I quote the magistrate's testimony as it appears from the record:

'Makgoba M (J): He said he does not want to make a statement? Just repeat that one, the question again and the answer? … The *reply was no* here.

Ja, just repeat the question for me again … Do you nevertheless wish to make a statement? And the answer? … *No***.**

So he said he does not want to make a statement? Is that what I understand? … Yes, *I cannot* remember well there.' (My emphasis.)

[18] As can be seen from the exchange between the trial judge and the witness, it should have been pertinently clear to the trial court that the first appellant undoubtedly answered in the negative to the question whether or not he wished to make a statement. Interestingly, the first appellant also repeated in paragraph 16 of the form that he did not wish or prefer to make a statement.

[19] In my view the fact that the magistrate still proceeded to record the confession and the fact that the trial court ruled that the confession was admissible resulted in a serious miscarriage of justice and rendered unfair the first appellant's trial. The trial court also ignored or overlooked, inexplicably, Inspector Munyai's testimony when he conceded that he duly advised the first appellant of the advantages of making a confession namely, that such confession was going to allow the matter to proceed quickly. This in my view, amounted to unduly influencing the first appellant to make the confession.

[20] The first appellant's so-called confession ought also to have been excluded on another basis. The statement is not, in my view, an unequivocal admission of guilt as, although he placed himself at the scene during the commission of the offences, he nonetheless exculpated himself from any wrongdoing by averring that he was coerced by his co-accused, the second appellant, to act in the manner in which he did. I quote from the relevant parts of his statement:

'He then told me to enter inside. When I entered he ordered me to search two male persons who live there. I searched that man and took R55.00 (Fifty five rand) from his pocket

…

He again called me and I was still frightened. There was a knife on the table. I took a knife and stabbed another person at his back.'

As not all of the elements of the offences were admitted, the first appellant's statement did not amount to a confession and ought to have been excluded.

[21] This unfortunate trend about the poor completion of the pro-forma form continued even with regard to the second appellant. The magistrate omitted for example, to record the answer given to the question of whether the second appellant had wished to make a statement and whether or not he had been assaulted or coerced into making a statement. Although the magistrate later testified that he could recall that the answer given was 'yes', the correctness of his version to the questions posed is doubtful as he later stated that on the day concerned he was extremely busy and that he was manning two courts by himself.

[22] The magistrate also omitted to record his observation whether the second appellant was in his sound and sober senses with specific reference to anxiety, nervousness, joviality and demeanour. This has to be considered against the backdrop of the second appellant's evidence that when he was brought to the magistrate to make the confession, he was dizzy because he felt he was being forced to admit an offence which he did not commit. Even more disturbing is the fact that in reply to the question of how it came about that the second appellant was brought to make a confession, the magistrate simply recorded the answer given, namely, that he was advised by Inspector Munyai, the investigating officer to report there. In my view, this was a red flag and is

something that should have alerted the magistrate and prompted him to make a follow up to ensure that this accused was not influenced in any way into making any confession.

[23] With regard to the conduct of the trial, specifically in relation to the trial within a trial, the trial judge committed a number of serious irregularities and misdirections. Firstly, he erroneously ruled at the commencement of the trial within a trial, that the appellants had to first adduce evidence to prove that the confessions were not freely and voluntarily made and without any undue influence. This, in my view, is a gross misdirection because the onus to prove the admissibility of a confession rests, always, on the State.[9] The erroneous shifting of the onus to the appellants rendered their trial unfair.

[24] The trial judge also ignored the fact that the same magistrate recorded both appellants' confessions albeit on different dates ie 2 September and 9 September 2002 respectively. There is nothing in the record that indicates that the trial judge made any attempt to check whether or not another magistrate was available to take down the second appellant's confession later on. Whether or not magistrate Matamela was aware that the second confession related to the same incident as that of the first appellant and if so, whether he sufficiently warned and cautioned himself not to be in any way influenced by what he already knew as emanating from the first appellant's earlier confession, is doubtful.

[9] *S v Zuma & others* 1995 (2) SA 642 (CC).

[25] After the second appellant had given his evidence-in-chief in the trial within a trial and before the prosecutor could cross-examine him, the trial judge remarked and asked the prosecutor: 'Mr Nekhambela, I do not know if you would like to cross-examine this witness. He made a very bad impression. I do not know, as a witness really. I do not know whether would it be worth for you to cross-examine him, but you can have that time. But he made a bad impression, really, I do not know. Do you have any questions for the witness'? Other than the fact that this unfortunate remark shows that the trial judge had already decided that he was not going to accept the second appellant's evidence, a perception of bias on the part of the trial judge by any reasonable person was, in my view, in the light of the circumstances of this matter, inevitable.

[26] Our courts have persistently warned against the threat to the legitimacy of our criminal justice system, created by perceptions of bias during hearings, given its adversarial nature. *In S v Basson,*[10] the Constitutional Court expressed itself in this regard as follows:

'[27] The impartiality of a judicial officer is crucial to the administration of justice. So too is the perception of his or her impartiality. These principles are recognised in many foreign democracies. Thus in *Van Rooyen & others v The State & others (General Council* of the *Bar of South Africa Intervening)*[11] this court cited with approval the following reasoning of Le Dain J in the Canadian Supreme Court in the case of *Valente v The Queen*:[12]

Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice.

[10] *S v Basson* 2007 (3) SA 582 (CC).
[11] *Van Rooyen & others v The State & others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) para 32.
[12] *Valente v The Queen* [1985] 2 SCR 673.

Without that confidence, the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.'

[27] This court has also expressed similar concerns. In *S v Le Grange & others,*[13] Ponnan JA affirmed that the cornerstone of our legal system is the impartial adjudication of disputes and that the law required 'not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be "manifest to all those who are concerned in the trial and its outcome especially the accused"'.[14] In my view, therefore, the conduct of the trial judge in this case sustains the conclusion that he was not open-minded, impartial and fair during the second appellant's trial within a trial.

[28] The final misdirection that was committed by the trial court which, in my view, is totally decisive of the fate of this appeal, occurred when the trial judge decided in his reasoning to apply the confessions and admissions by all three accused against one another, in clear violation of s 219 of the CPA. I consider it appropriate to quote an excerpt from the trial judge's judgment in this regard. He said the following:

'Whatever version they gave before the court, if one looks at the confession and the admissions made, then the court is inclined to accept the version of the state. On count 1, that of murder, the court makes a finding that it is indeed so, accused 3 wanted to get rid of the deceased because he believed that the deceased would be a state [witness] against him.

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[13] *S v Le Grange & others* 2009 (1) SACR 125 (SCA) para 16.
[14] *S v Roberts* 1999 (2) SACR 243 (SCA); 1999 (4) SA 915 (SCA) para 25, quoting *S v Rall* 1982 (1) SA 828 (A) at 831H-832A.

Then he wanted to get rid of him. He solicited the assistance of accused 2, who in turn solicited the assistance of accused 1. In the circumstances then, the court finds that there was a conspiracy to murder, between accused 2 and 3. Accused 1 joined in, realising and even knowing fully well that there was a conspiracy to get rid of the deceased. In the circumstances I make a finding that there was common purpose between the three accused and all three are accordingly found guilty.'

The trial court erred by not delineating and treating each confession separately as against its specific maker, and instead treated all of them in blanket fashion against all the accused.

[29] I am satisfied that the taking down of the appellants' confessions and the conduct of their trial, especially the trial within a trial, were characterised by serious misdirections, gross procedural irregularities and material non-observance of the statutory requirements contained in ss 217 and 219 of the CPA, and other principles governing confessions. Furthermore, there was a serious violation of the appellants' constitutional right to a fair trial as required by s 35(5) of the Constitution. The State accordingly failed to discharge its onus of proving that the appellants' confessions were made freely and voluntarily and without any undue influence. The confessions ought to have been excluded but were wrongly admitted into evidence. Without the confessions, there was no evidence to sustain the convictions. In the result this appeal must succeed and both appellants' convictions must be set aside. In light of this finding, I do not deem it necessary to consider the appeal against sentence.

[30] I accordingly make the following order:

1 The appeal against the convictions is upheld.

2 The convictions of both appellants on charges of murder, assault with intent to commit grievous bodily harm and robbery with aggravating circumstances are set aside.

3 The order of the trial court is set aside in its entirety and replaced with the following: ‘Both accused are found not guilty and discharged on all the charges.’

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B H Mbha

Judge of Appeal

APPEARANCES:

For Appellants:	L M Manzini
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