

SOUTH AFRICA / JUDGMENT

Mangwale v S (A744-16) [2018] ZAGPPHC 462 (25 May 2018)

[2018] ZAGPPHC 462

COURT

North Gauteng High Court, Pretoria

BEFORE

Potterill, Fabricius, Molefe

CASE / FILE NUMBER

A744-16

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IN THE HIGH COURT OF SOUTH
AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

NOT

REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

(3)

REVISED,

Case

Number: A744-16

25/5/2018

In

the matter between: BRIAN
 MANGWALE
 Appellant
 and
 THE
 STATE
 Respondent

JUDGMENT

POTTERILL J

- [1] The appellant was convicted on one count of murder and one count of kidnapping. He was sentenced to life imprisonment on the murder count and six years imprisonment for the kidnapping. At the commencement of the trial the state closed its case on three further counts, without leading any evidence and the court a quo thus did not have to pronounce on these counts. The appellant was found not guilty on count 6, one of rape. The appellant is with the leave of the court a quo appealing against his convictions and sentences.
- [2] On the 31st of December 2009 Masego Kgomo [Masego] told her mother that she was going to play with her friends down the road, as little girls of 12 would. Neither of them could have foreseen that on the last day of 2009 it would also be the last day of Masego's 12 years of life, having suffered a horrific death.
- [3] The record is voluminous and I do not find it necessary to summarise all the evidence. The state's evidence to the chronology of Masego's last day is that wearing an orange vest, black leggings, plastic jelly tots sandals and a braid in the hair she went to play with inter alia K, D, T and G. The appellant approached the children whereupon Masego went to buy the appellant a cold drink. O met Masego later at Pantjies place where Masego was buying bunny chow. The appellant was also at Pantjies Place and asked O to go and buy him R6 worth of airtime. The appellant instructed O to give the airtime to Zorro-Zorro. Masego did not accompany O to Zorro-Zorro because she was still waiting for the bunny chow. D o who was also present went with O, as he knew who Zorro-Zorro was. O and D thus left Masego and the appellant behind. This is the last time that Masego was seen alive. Not only the police. but the whole community of Soshanguve was searching for Masego for eight days. On 8 January 2010 Masego's mutilated decomposed body was found close to the Soshanguve Station.
- [4] The crux of the appeal is the acceptance of the court as evidence the three confessions. warning statement and two pointing-outs made by the appellant.

[5] The first point raised is that the appellant suffered "unbearable prejudice" because at the close of the state's case the evidence pertaining to the pointing-out, confessions and warning statement were admitted provisionally leaving the appellant uncertain as to what case he had to meet. This prejudice culminated in an unfair trial.

[6] This ground of appeal is bad in fact and law. The court a quo made a clear and unambiguous finding directly after the trial-within-a-trial proceedings that the two confessions, the warning statement and the two pointing-outs were "as admissible as evidence." [1] There is no basis for any inference to be made that this evidence was admitted provisionally. The reliance placed on the Molimi matter [2] is misplaced; therein the Constitutional Court found that the ruling of hearsay evidence to be admitted after the accused had testified

led to an unfair trial.

[7] Once evidence is admitted, the admission is "provisions!" only in the sense that evidence may thereafter emerge which requires it to be excluded [3]. Although a court's decision at the conclusion of a trial-within-a-trial is interlocutory, it is only such should new facts bearing on the admissibility of the confession come to light at a later stage.

[8] Much was made of the verbatim words of the court a quo in this judgment on the merits which reads as follows:

"At the end of the trial within a trial I made a ruling that the warning statement by Colonel Nkomo, the pointing-out by Captain Rebisi, a confession before Magistrate Luus, the pointing-out by Captain Mamabola and the confession before Magistrate Jantjies were all provisionally admitted as evidence".

In view of the fact that in law the evidence being admitted is only interlocutory in the sense that evidence may thereafter emerge requiring the evidence to be excluded, the remark by the court a quo cannot change this de jure situation. In his ruling on the admissibility he clearly indicated that it was admitted and the appellant knew he had to meet this evidence in the trial, the appellant in fact did so.

[9] I am satisfied that the appellant knew at the end of the state's case whether to elect to testify, or not, and what evidence he had to answer. [4] The entrenched rights set out in section 35(3) (h) and (j) of the Constitution [5] were upheld and the evidence admitted did not render the trial unfair, or otherwise detrimental to the administration of justice.

[10] The second ground of appeal relied upon is ironically that the court should have overturned its decision to admit the evidence relating to the trial-within-a-trial due to the evidence of two witnesses called by the court at the end of the appellant's case. Furthermore the further pointing-out by the appellant in relation to another matter supports the submission that the evidence is inadmissible. These two witnesses testified that they were assaulted prior to making statements. The appellant once again testified that prior to this further pointing-out he was again assaulted.

- [11] The appellant indicated that he wanted to make a further pointing-out and Superintendent Maluleke on the 12th of March 2010 was roped in to assist with this pointing-out. It was put to Maluleke that the appellant was threatened and assaulted and that is why the pointing-out was done. This defence is untenable in view of the fact that it was never denied that just prior to the pointing-out the appellant was taken to a clinic where a doctor completed a J88 wherein no injuries or any signs of assault could be identified. Maluleke testified that due to detainees regularly averring that they are assaulted, it was his practice to take suspects to a doctor before a pointing-out or confession was to be made. Maluleke denied that there was an opportunity for assault, or that any assault took place.
- [12] The appellant made a further confession to Magistrate Thupudi to whom the appellant also did not report that he was assaulted or threatened to do so. The appellant could not in the further pointing-out or confession remember who the deceased child was or when the incident took place. In the appellant's warning statement he set out that he had been supplying to the sangomas Jan and Mabunda children to kill for purposes of muti for a long period prior to December 2010, before Masego had disappeared. This pointing-out and the confession to Magistrate Thupudi led to the police searching for dockets correlating to the version set out by the appellant. A correlation was drawn to the Rietgat matter of Maria Zitha. Those are the charges set out in counts 1-3 with which the state did not proceed against the appellant as the appellant was indeed in prison when the Zitha child went missing. The only inference is not that the appellant was forced to confess to a crime that took place whilst a detainee. In

view of his own confession to previous murders and the fact that he could not recall the date or name of the deceased, the inference is that it related to another child being murdered; not Zitha. This inference is fortified by the fact that members of the police will not coerce a pointing-out and confession with no victim, especially so in view of the appellant's confessions and pointing-out that they had in their possession.

- [13] The court called Nono Mathebela to testify whether he on 31 December 2009 at around midnight was in the company of the child Masego. The court called this witness due to the two witnesses on behalf of the appellant, Nthabiseng Chico and Mmanoko Chico testifying that they saw Nono with a child wearing similar clothes to those of the deceased on the 31st of December 2009. He was duly informed of his rights against self-incrimination. He denied that he was with the child at that time

and place, but told the court that he witnessed how the child was murdered by one Jan, Mabunda and the appellant. He testified that he was arrested, assaulted and was taken to court. No statement or pointing-out was made by this witness to the police or a Magistrate. He did not in his evidence in chief relate or set out how he was assaulted. In cross-examination by the appellant's counsel he made the bald averment that he was assaulted.

- [14] The court rejected the version of the appellant and his witnesses that he was not with the child, but that Nono was with the child. The bald statement that he was assaulted with no details thereof and the assault never being volunteered when questioned by the court, was not a foundation to rule the admitted evidence as inadmissible.
- [15] To rebut the evidence of Nono Mathebula the court allowed the defence to reopen its case and call the witness O M, the 16 year old. In a nutshell his evidence was that Nono was in the presence of a young girl and that Nono and Joseph raped the girl while he was present with Joseph restraining the witness at the scene. In cross-examination he was confronted with two statements he made to the police. The inconsistencies between these statements and his evidence in court was highlighted. He admitted that he made the two statements voluntarily and he was not influenced by anybody and they were signed in the presence of his mother. He did however testify that he was assaulted from the 2nd of January to the 5th of January and he did not tell his mom. Pertaining to the assault and the statements he testified as follows:

"There was no person who forced what is it that I must write and what is it that I must not write, I volunteered to do it."[6]

The court a quo correctly rejected the evidence of this witness due to all the inconsistencies therein. Any averment of assault from the 2nd of January to the 5th of January 2010 is thus also rejected. But, in any event, it is quite clear that the statements he did make were voluntary with his mother present at his side. It is also against human nature for a son of 16 not to inform his mother that he is being assaulted by the police.

The two witnesses called by the court, a further pointing-out by the appellant and the witness called to rebut the evidence of the witness called by the court, did not throw new light on the voluntariness of the evidence admitted by the trial within a trial rendering the court to reassess the finding of the evidence to be admitted.[7]

- [16] The crux of the third ground of appeal is that the court a quo did not reject the appellant's version that he was assaulted prior to the making of the confessions and pointing-outs. The court only rejected that the appellant was told what to set out in the confessions and warning statement. The court thus erred in ignoring the portion of section 217 of the Criminal Procedure Act 51 of 1977 ("the Act") that the confessions must be made freely and voluntarily. This submission is simply wrong. The court a quo pertinently rejected the appellant's version that he was assaulted. The court found that in the statements of 18 January 2010 "[Appellant] could not have been influenced by any assault, threats, force or influence as there was no evidence that the accused was booked out of the cells to be assaulted at any stage three days prior to the statements being taken." [8] The court concluded this because the appellant never averred that he was assaulted at the police station where he was held but outside of the police station. The court elaborated that he made this finding on the objective evidence set out in the occurrence book entries. The court found that there was no evidence that the appellant was assaulted prior to the confession to Magistrate Jantjies or the pointing-out to Mamabolo.[9] The court a quo found

that The court a quo found that pertaining to the other confessions and pointing-out statements the appellant's evidence was unreliable because the police could not have had knowledge to tell the appellant what to say; he alone was privy to this Information. The appellant's

version including the averred assaults, was accordingly rejected. The court found the appellant to be untruthful and not a credible

witness.

[17] This ground of appeal had another leg to it In that it was argued that the three confessions contained mutually destructive versions and the court should not have accepted them. In the leave to appeal the court s quo itself expressed that it could not find any authority dealing with instances where a suspect made multiple confessions at different times during detention.

[18] In understanding the multiple confessions the chronology of the pointing-outs and confessions is import nt. On 8 January 2010 the appellant told the police he would take them to a woman who would be able to tell them where the missing child is. He then, while in the vehicle, told the police he would show them where the body is. The appellant took them to the Soshanguve Station and behind overgrown bushes the body was indeed found. He is then on 8 January 2010 placed under arrest. Later that evening Superintendent Nkomo takes a warning statement from the appellant.

The appellant's version was that he was not assaulted, but that he did not provide any of the information to Nkomo. That in fact Nkomo provided him with this 13 page statement that he was forced to sign. The court correctly rejected the appellant's version that he was forced to sign this document without him providing the information because only the appellant was privy to much of the information therein.

[19] On 10 January 2010 the appellant was booked out of the cells at Soshanguve Police Station at respectively 10h50 and back at 13h05 and at 16h40 and back at 22h05. The appellant averred that it is in these time slots that the police had the opportunity, and indeed did assault him.

[20] However, in the first time slot it is common cause that the appellant was taken to his parental home. The purpose of this was to look for land and seize the clothes that the witness was wearing at the time the child disappeared. Witnesses, and the appellant himself, had testified that on the 31st of December 2009 he was wearing blue coat/jacket. The blue jacket was found at the home with the appellant's mother and his siblings

present. They also found traditional medicine in a bottle in his room. The appellant provided no detail as to the assault that took place on that excepting that it happened in the bushes. The court a quo correctly rejected that no such assault took place. The second booking out was for further investigation. This investigation was led by then Director Mapiyane. Police officials Sithole, Mammotsa and Matige took not only the appellant, but three other suspects to the Organised Crime offices in the Pretoria CBD. The reason for this was that the Director had access to these

offices whereas at the Soshanguve Police Station the interviewing rooms at the station were locked due to it being a Sunday. Director Mapiyane was asked to step up the investigation as the situation in Soshanguve was volatile due to this missing child. Four suspects were thus interviewed as a result of the warning statement made by the appellant to Nkomo. The appellant during his Interview told Director Mapiyane that he wanted to make a confession. The appellant averred that during these interviews he was assaulted with a red tyre tube that was utilised to suffocate him while his hands and legs were tied with a rope behind his back. Due to the appellant's request to make a confession Lt Colonel Malema was then called to take the confession. Malema testified that he utilised a pro forma form and warned the appellant of his rights. He was alone in the office while the appellant made the statement. He noted injuries on the wrists of the appellant that were consistent with those made by handcuffs. The appellant started to narrate the

contents and he often had to stop the appellant because he was telling his story too quickly and Malema could not keep up with

writing it down. He denied the appellant's version that he was part and parcel of the officials that booked him out on 10 January 2010. He did not know Captain Motige. He had no knowledge of the investigation before he was called to the station. He only met the investigation officer of this matter when the subpoena was served on him to testify. He testified that the appellant and himself were both tired as it was late on a Sunday evening, but as a result of this neither of them had an advantage over the other.

[21] On the 11th of January 2010 the appellant made a pointing-out wherein he showed the police where he threw the shoes of the deceased after they killed her. This pointing-out was conducted by Captain Ribisi. On the same date, 11 January 2010 the appellant was taken to court. In court the appellant made certain admissions. They were ruled inadmissible because the appellant was not Informed of his constitutional rights. It was as a result of these admissions that the senior prosecutor enquired from the investigation officer whether the appellant was taken to a Magistrate for a confession. This prompted the appellant to be taken to Magistrate Luus where he then made a formal confession.

[22] On 15 January 2010 the appellant indicated to Colonel Mabaswa while visiting the cells that he wanted to speak to the investigating officer. Constable Mammotsa went to see the appellant whereupon the appellant informed him that the place where the deceased was found was not where she was killed and that the appellant could show him where the killing took place. This led to the pointing-out on the 15th of January 2010. On 18 January 2010 he then made a further confession to Magistrate Jantjies.

[23] The averred material mutual destructiveness of the versions relate to who killed Masego. In the appellant's warning statement he described that he took Jan, a witchdoctor, up on his offer to get him a girl, younger than 12, not sexually active, for body parts. He kidnapped the girl, but does not expand on the murder and the removal of the body parts. In the confession to Superintendent Malema he again describes the kidnapping of Masego, but

goes a step further confessing to him taking his own knife and stabbing Masego on her stomach while Nono took out the body parts. In the confession to Magistrate Luus he expanded that Masego was first raped and that Nono strangled Masego whilst the appellant held her legs. He then confesses that he stabbed Masego with a knife and that he removed the body parts. In the confession to Magistrate Jantjies he is still part and parcel of the kidnapping and on the scene when she is murdered, but now it is not him stabbing, but the traditional healer end also the traditional healer removing the body parts.

- [24] It is firstly improbable that the members of the police would keep on assaulting and threatening the appellant to make more confessions when they were in possession of two confessions wherein the appellant confessed to the killing. On the other hand it is probable that closer to the trial commencing when the appellant had already appeared in court, he would voluntarily make a further confession to Magistrate Jantjies distancing himself from the actual killing of Masego. The versions in the confessions tell the same story, it just differs as to whether he did the act of stabbing or was just present when the stabbing of Masego was done.
- [25] If in a matter there are multiple confessions It could never per se lead to all the confessions being excluded as evidence. The evidence needs to be evaluated. In some circumstances it might lead to exclusion, but not in the matter at hand. The court a quo with no other direct evidence as to who did the stabbing found the appellant guilty on common purpose. The court, thus erring on the side of caution, has no impact on the fact that the state proved the murder of Masego and the appellant's part therein beyond reasonable doubt.
- [26] The last string to the appellant's bow was that the court misdirected itself by using the evidence of the accused and that of the state presented in the trial-within-a-trial in the main trial to come to a conclusion. I cannot find that the court a quo utilised any of the of the evidence given in the trial-within-a-trial as evidence upon which he based his final judgment. Any cross examination by the state in the main trial based on evidence given in the trial-within- a-trial, if any, was not material to the court coming to a final judgment.
- [27] I am satisfied that the confessions and pointing-outs were admissible in sections 218 and 219 of the Act. I am also satisfied that fairness did not require that the confessions or pointing-outs be excluded in order for proceedings to comply sections 35(3) of the Constitution.

Ad sentence

- [28] Although the appeal lies against sentence the appeal against sentence was not seriously argued. The only issue raised was that this court should subtract the close to two years that the appellant was in custody from the sentence period. However, pre-trial detention is just one of the factors the court considers when deciding upon an appropriate sentence.[10] The trial court had considered all the factors that had to be weighed in the balance to determine whether the sentence that it imposed was appropriate in all the circumstances. This murder

attracted in terms of the Criminal Law Amendment Act 105 of 1997 two life sentences. There was no compelling and substantial circumstances. The period of pre-trial detention on its own is not a factor to interfere with the sentence of life imprisonment. It would not be competent to make an order of detracting two years from a life sentence.

[29] I accordingly make the following order:

29.1 The appeal against the convictions is dismissed.

29.2 The appeal against the sentences is dismissed.

S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

H.J. FABRICIUS

D.S. MOLEFE

JUDGE OF THE HIGH COURT

CASE NO: A744/16

HEARD ON: 11 May 2018

FOR THE APPLICANT: ADV. J.M. MOJUTO

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. M.J. MAKGWATHA

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 25 May 2018

[1] Volume 8 page 793 lines 1-20

[2] S v Molimi 2008 (3) SA 608 (CC)

[3] S v Ntuli 1993 (2) SACR 599 (W)

[4] S v Mangena 2012 (2) SACR 170 (GSJ) paragraph 34

[5] Constitution of the Republic of South Africa 108 of 1996

[6] Record page 1102

[7] S v Mkwana 1966 (1) SA 736 SA 743

[8] Page 1184 lines 10-15

[9] Page 1185 lines 10-12

[10] Director of Public Prosecutions, North Gauteng Pretoria: Pretoria v Gcwala and Others 2014 (2) SACR 337 (SCA) paragraphs 15-19

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