

SOUTH AFRICA / JUDGMENT

Ndlovu v S (Reasons) (AR 145/2024)

[2025] ZAKZPHC 27; 2025 (1) SACR 506 (KZP) (7 March 2025)

[2025] ZAKZPHC 27

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Olsen, Chili

CASE / FILE NUMBER

AR 145/2024

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case no: AR145/2024

In the matter between:

HLONIPHILE NDLOVU

APPELLANT

and

THE STATE

RESPONDENT

REASONS**FOR JUDGMENT**

Olsen J with Chili J

- [1] The appellant in this matter, Ms Hloniphile Ndlovu, was convicted in the Regional Court sitting at Ulundi on 24th January 2024 of the murder of her husband. On 25th January 2024 she was sentenced to life imprisonment. Her appeal is against both conviction and sentence.
- [2] On 28th February 2025 we heard argument in the appeal. At the close of oral argument we made an order upholding the appeal and setting aside her conviction and sentence. We stated that reasons would follow, as they now do.

- [3] Whilst there is much that could be said to explain our conclusion that the conviction in this case was manifestly unsafe, we confine ourselves to the one central issue which on its own renders it unnecessary to consider the other matters which give rise to concern. The trial of this action commenced with a trial within a trial in which the State sought the admission into evidence of a confession allegedly made by the appellant. The presiding magistrate ruled the confession admissible, whereupon the State closed its case. No evidence at all, besides the confession, was led by the State in order to support its contention that the deceased died at the hand of the appellant, or rather one of her alleged co-perpetrators.
- [4] As to the fact that a crime had been committed the State produced the report on the post-mortem examination of the deceased which established that he was shot to death, and a photograph album containing photographs of the scene at which the deceased's body had been found. These documents were entered into evidence without objection from the defence.
- [5] The photographs of the scene were taken a little after 9am on the 17th of October 2019. One assumes that the body had been discovered that morning. On Friday the 18th of October 2019 the appellant travelled from Pietermaritzburg, the district where she lived, to Ulundi in the company of members of the deceased's family in order to go to the mortuary in Ulundi. On the way they received a message that they should stop off at the police station first, which is what they did. That is where the appellant met the investigating officer, a Constable Mfusi. According to Constable Mfusi he questioned the appellant as to what she might know about the death of her husband, and asked her whether she had not come to Ulundi on the day of the disappearance of her husband (a date never revealed in evidence). She said she knew nothing about his death and disappearance. According to Constable Mfusi he then pressed her saying that he had information that she was expected to be in Ulundi to assist her husband to undergo a cleansing ceremony. He told her that this information had been obtained from one Babayi Buthelezi, a friend of the deceased known to the appellant. According to Constable Mfusi he requested the appellant to tell him the truth "because the truth would set her free", whereupon she agreed to do so. He told her that she would be taken to a magistrate or a commissioned officer to make a confession. She was detained at the police station. Constable Mfusi was asked directly whether the appellant said anything about legal representation and he said that she did not.
- [6] In fact an attorney, Mr Kunene, who practises in Pietermaritzburg, had been engaged by the appellant's brother to represent the appellant, and the attorney briefed a Mr Nene, an advocate practising in Pietermaritzburg. This information was conveyed to the appellant whilst she was in custody at the Ulundi police station, and according to her evidence the fact that she was thus represented was discussed between her and Constable Mfusi.

- [7] The appellant testified that during the interview held on Friday (18 October 2019) she was held down by police officers in a room at the police station and had a piece of plastic placed over her face in order to suffocate her. She was told to signal when she was ready to confess. She did so when she found she was out of air, and for that reason said that she would make a statement. Her evidence on this score was typical of the type one hears frequently in court when confessions are repudiated.
- [8] A Lieutenant Colonel Mthimkhulu who was stationed at Vryheid was requested to come to the Ulundi police station on Saturday the 19th in order to take the appellant's statement. According to him he took the appellant's statement on his own, dispensing with the services of an interpreter. He said that her answer was in the negative when he asked her whether she had been assaulted. The appellant agreed with that but said that she had added that she had had plastic placed over her face in order to suffocate her in order to get her to agree to make a statement. (She explained that on her understanding of the word "assault", the placing of plastic over a person's face in order to suffocate them is not encompassed by the word.) According to Lieutenant Colonel Mthimkhulu the text of the statement he wrote out was the appellant's. According to the appellant it was manufactured by the police. According to Lieutenant Colonel Mthimkhulu the appellant declined legal representation. According to the appellant she told Lieutenant Colonel Mthimkhulu that she already had legal representation. There is no need for present purposes to say any more about these disputes.
- [9] Mr Nene was called to give evidence during the trial within a trial. On the morning of Saturday 19th October he was informed that he was engaged to represent the appellant. He was in Pietermaritzburg at the time. He was told that

the appellant was detained at the Ulundi police station. He called the police station in order to ascertain the identity of the

investigating officer and was told that it was Constable Mfusi. He was given the latter's cellphone number. He telephoned him. He asked the investigating officer to convey to the appellant that he (Mr Nene) was going to represent her. He asked the investigating

officer whether the accused had been charged and was given a negative answer. He told Constable Mfusi that the appellant must be told that she should make no statement to the police without Mr Nene's knowledge. Constable Mfusi agreed and said that he would contact Mr Nene later on in the day.

- [10] Mr Nene became concerned, as the morning progressed, that he had not been contacted by Constable Mfusi. He tried calling him, but got no answer. Eventually he called a colleague, Mr Sibiya, who resides in Ulundi, to ask him to help as he was in Ulundi. Mr Sibiya called back later and told him that he had come across Constable Mfusi at a shop, and had conveyed the message to the investigating officer that Mr Nene was looking for him.

- [11] It was not clear to Mr Nene whether the appellant would appear in the Magistrates Court at Ulundi on the Monday, and he asked Mr Sibiya to stand in for him (Mr Nene) if she should appear. That was done and following these proceedings Mr Nene was informed that his client, the appellant, had made a confession. Anticipating that the confession would be challenged, Mr Nene withdrew as counsel for the appellant as it was apparent to him that he would be a witness in the case.
- [12] Under cross examination Constable Mfusi confirmed that he had been advised by attorney Kunene on Friday the 18th of October 2019 that he had been engaged to defend the appellant. He also confirmed that he had been contacted by Mr Nene, the advocate. His evidence was that he informed Mr Nene that his client wanted to admit to the offence and that arrangements had been made for a confession. His answer when questioned as to Mr Nene's response was

"he said, your Worship, it was okay and he was thankful that I alerted him. He would then see what he would do."

Constable Mfusi confirmed that he had not conveyed any of this information regarding legal representation to Lieutenant Colonel Mthinkhulu. He explained:

"... because even Advocate [Nene] did not say anything or he did not assure me if he was going to be present. He just said he will see what he will do."

- [13] It should be added that when this aspect of the case was dealt with in the cross-examination of Constable Mfusi, he volunteered that when he had come across Mr Sibiya at the shop on Saturday morning he had informed Mr Sibiya that arrangements had been made to take a confession. This aspect of the case was never cleared up because Mr Sibiya was the advocate who represented the appellant during the trial. The fact that Advocate Sibiya was conflicted caused some mirth, according to the record, on one or two occasions during the trial. That was entirely unjustified. His position of conflict was a serious matter. It is not as if the accused was being tried on some minor offence. Mr Sibiya should probably never have accepted the brief. But he certainly should have withdrawn the moment Constable Mfusi volunteered the claim that he had disclosed to Mr Sibiya that a confession was about to be taken. That information was not conveyed to Mr Nene by Mr Sibiya when they spoke on the telephone after the chance meeting at the shop. It strikes us as most improbable that it would not have been conveyed to Mr Nene by Mr Sibiya if Constable Mfusi's claim to have made the disclosure was true.
- [14] When he made his ruling that the confession was admissible the magistrate reserved his reasons for the decision to be dealt with in the main judgment. That was proper. What was improper was the magistrate's view that his preliminary finding that the State had proved beyond reasonable doubt that the confession was admissible was not one that could be revisited in the main case in the light of all the evidence then before the court. At a certain stage when leading the appellant's evidence in the

main case Mr Sibiya ventured into the material canvassed during the trial within a trial, but was stopped by the magistrate upon the basis that the issue had been finalised.

- [15] The magistrate disposed of the evidence of Mr Nene in a few lines of what was otherwise a long repetitive judgment. As some of those lines are incoherent it is probably best that they be quoted in full.

“Similarly her witness, Advocate [Nene] failed to make any good impression on the court in seeking to suggest that he was representing the accused without making any effort to either come to Ulundi SAPS despite being made aware that she wanted or that the accused wanted to make a confession. Let alone alerting his instructing attorney since he had to seek instructions in conveying the message as it had been given to him by Constable Mfusi. His version is found to be so improbable in that he was neither a credible nor a reliable witness and his evidence is rejected insofar as it is in conflict with the State’s case.”

- [16] We are unable to make any sense, even in the context of the whole judgment, of the sentence in the passage just quoted starting with the words “let alone alerting”.

- [17] As to the impression that Mr Nene had created in the magistrate’s mind, two comments will do.

- (a) The magistrate intervened throughout the trial making it difficult for defence counsel, and also at times prosecution counsel, to present evidence. His interventions during the evidence of Mr Nene included a lecture on the different roles of instructing attorneys and instructed counsel. In our view they evidenced antipathy towards Mr Nene. It was not warranted. The magistrate’s views on which legal practitioners should perform which functions when a client has been arrested over a weekend were misguided.

- (b) A reading of Mr Nene’s evidence illustrates that it was as near flawless as might reasonably be expected given that he was speaking to events which had occurred over a very brief passage of time some years before. There were no contradictions in his evidence. He answered all questions without any evasion. His evidence was clear in every material respect. His cross-examination achieved nothing.

- [18] The magistrate’s criticism of Mr Nene that despite being told that his client was about to make a confession, he failed to travel to Ulundi (some four hours drive away) constitutes a material misdirection. The criticism rests upon proposition that Constable Mfusi’s evidence that he had told Mr Nene that a confession was to be taken was true. But its truth was contested. The magistrate’s reasoning is a species of the age-old misdirection perpetrated when a judicial officer assumes that the police would not lie, as a result of which the accused’s evidence must be false.

- [19] In rejecting Mr Nene’s evidence the magistrate ignored the probabilities altogether. Mr Nene is no newcomer to the law. He attained the B Juris degree in 1995 and the LLB degree in 1997. He was appointed a prosecutor in 1999, and performed those functions at Kranskop and Richmond. In 2003 he became a Regional Court prosecutor in Pietermaritzburg. In 2005

he prosecuted in the High Court as a State Advocate. He was thereafter appointed as a senior Public Prosecutor in Pietermaritzburg. After a short stint in Local Government in 2008 he joined the Independent Bar in Pietermaritzburg as an Advocate in 2009. He practises criminal law. He had been briefed to represent somebody who had been detained in connection with a murder charge. He contacted the police station

at Ulundi in order to ascertain the identity of the investigating officer, and having done that he telephoned the investigating officer in order to advise him that he represented the appellant. It is the prosecution's case that Constable Mfusi informed Mr Nene that his client was going to confess that day, that Mr Nene's response was to the effect that he would see what he would do, and that he in fact did nothing. That sequence is so improbable that it had to be rejected. Once that is done matters become clear.

[20] Constable Mfusi did not tell Mr Nene that arrangements had been made to take a confession from his client. Instead he rushed into the process and the conclusion must be that he did so deliberately. No "innocent" reason presents itself as an explanation for why it was necessary for a confession to be taken on a Saturday. Magistrates might have been available on the Monday. Why did Lieutenant Colonel Mthimkhulu have to drive from Vryheid to Ulundi on a Saturday? The most probable explanation is that Constable Mfusi sought to bring about that a statement be taken from the appellant before she received legal advice which was likely to caution her against the waiver of her right to remain silent. Any doubt about Constable Mfusi's intention in this regard is removed by the fact that, whilst he conceded, as he had to, that he knew that legal representatives had been appointed for the appellant, he failed to disclose that fact to Lieutenant Colonel Mthimkhulu.

[21] Section 35(1) of the Constitution provides that everyone who is arrested for allegedly committing an offence has the right to remain silent and to be informed promptly of that right, and of the consequences of not remaining silent. Section 35(2)(b) is to the effect that everyone who is detained has the right

"to choose, and to consult with, a legal practitioner and to be informed of this right promptly".

(Our emphasis.)

The word "promptly", when applied to the right to consult with one's legal practitioner, must be taken to convey that the detained person must be informed of that right at least in reasonable time to permit of its meaningful exercise. Rushing to secure a confession from a detained person before there is an opportunity for such consultation is a material breach of the constitutional right. Doing it intentionally brings the administration of justice into disrepute. Section 35(5) of the Constitution applies on that account, and because Mfusi's conduct breached the fair trial rights of the appellant. The section reads 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."

[22] For these reasons, and following the reasoning set out in *S v Mphala & another* 1998 (1) SACR 388 (W) at 388 to 400, the magistrate ought to have refused to admit the confession into the evidence. (See *Magwaza v The State* [2015] ZASCA 36 (25 March

2015) at paragraphs 16 to 22.) Regarding paragraph 22 of the judgment in *Magwaza*, we would merely add that we experience little anxiety over the outcome in this case, given that the alleged confession of the appellant raises a number of questions or issues which were within the capacity of the State to investigate, and which would in all probability have generated supporting evidence if in fact what appears in the document is true. The statement contains no information so personal to the appellant that only she could have provided it.

[23] For these reasons we made the order upholding the appeal and setting aside the conviction and the sentence.

Olsen J

Chili J

Case Information:

Judgment

reserved:

28 February 2025

Reasons

for Judgment delivered: 7 March 2025

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