

SOUTH AFRICA / JUDGMENT

Nhlabathi v S (A525/2016) [2020] ZAGPPHC 752 (17 December 2020)

[2020] ZAGPPHC 752**COURT**

North Gauteng High Court, Pretoria

BEFORE

Janse van Nieuwenhuizen, H.M. Msimang

CASE / FILE NUMBER

A525/2016

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**IN THE HIGH COURT OF SOUTH
AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA
(1)**

REPORTABLE:

NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED.
Case
Number: A525/2016
In

the matter between:

JABU
DECEMBER NHLABATHI
Appellant
and
THE
STATE
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The appellant was convicted of murder and sentenced to 20 years' imprisonment. The appeal is against both the conviction and sentence.

The charge and conviction

- [2] The appellant was charged as follows:

'THAT the accused are (is) guilty of MURDER (read with the provisions of Section 51(1) Part 1 Schedule 2 of the Criminal Law Amendment Act 105 of 1997) albeit as co perpetrator(s), accessory(ies) after the fact, accomplice(s) or in the execution of a common purpose.

IN THAT upon the 21/01/2012 and at or near Amersfoort, in the Regional Division of Mpumalanga, the said accused did unlawfully and intentionally kill Celiwe Manana a female person, by shooting her several times, in circumstances where the murder was planned or pre meditated."

- [3] It is common cause that the appellant was not the person who shot the deceased. In finding the appellant guilty the court a quo stated the following:

'Die hof is tevrede as 'n mens na die geheel van die getuienis kyk dit bo redelike twyfel vasstaan dat die beskuldigde betrokke was by die beplanning van hierdie moord en dat hy ook uiteindelik die person is wat die oorledene in haar woning gaan uitwys het. "

- [4] From the aforesaid, it appears that the appellant was found guilty on the principle of common purpose.

- [5] The appellant's conviction is based on a confession and the evidence of four state witnesses. It is apposite to first of all deal with the confession and thereafter to analyse the evidence of the state witnesses.

Confession

- [6] The confession was made on 3 February 2012 before magistrate Deacon at Volksrust Magistrates' court.

- [7] The following extracts from the pro forma confession form is relevant for present purpose:

'... when were you arrested?

Reply: Last week Tuesday, 24th"

"Have you been assaulted by anyone?

Reply: No, but Mr Botes assaulted me during my arrest. "

"If so, by whom, when and what were the circumstances?

Reply: 24. 1. 2012 +_ 22h00, Mr Botes + Lepaka + other people whose names I do not know. They are all police officials. "

"Have you been threatened forced or influenced by the police or anyone else should you refuse to make this statement?

Reply: Those police officials of the 24th said they will kill me.

Reply: Botes, Lepaka + other members threaten me on 24.1.2012. This morning Botes searched me for weapons but did not speak to me. "

"Have you wounds or injuries?

Reply: Yes.

If so, where are they and how did you sustain them?

Reply: Scratch at back bone, + both wrists where the handcuffs scratched."

Magistrate's observations regarding injuries:

Wounds are healing on wrists

Complain of thumbs feeling dead

On back, pink wound, look as if in healing process as well.

Have you other than having been threatened, forced or influenced by any person, been encouraged to make this statement?

Reply: No nobody forced me. I have realize I have to make a statement

If so, by whom, when and what were the circumstances?

Reply: I think that I must do this. I am afraid my family might be emotionally abused. "

"Magistrate's observations:

Relaxed, avoid eye contact most of the times. Rubs forehead before answering questions.."

(own emphasis)

[8] Notwithstanding the aforesaid, the magistrate continued to take down the confession of the appellant. During evidence in the court a quo magistrate Deacon stated that the assault and threats by the police happened ten days prior to the confession and that she was of the view that it had no bearing on the question whether the appellant made the confession voluntarily and out of his own free will.

[9] The court a quo agreed and the confession was admitted into evidence.

- [10] In view of the Bill of Rights contained in the Constitution, both the decision by magistrate Deacon to obtain the appellant's confession and that of the court a quo to allow the confession into evidence is disconcerting to say the least.
- [11] Section 7 of the Constitution confirms that the Bill of Rights is the cornerstone of democracy in South Africa and affirms the democratic values of human dignity, equality and freedom. The State is specifically instructed to respect, protect, promote and fulfil the rights in the Bill of Rights.
- [12] Section 12 contains the right to freedom and security of the person. Section 12(1) more specifically provides that:

"Everyone has the right to freedom and security of the person, which includes the right:

- a. not to be deprived of freedom arbitrarily or without just cause,·
- b. not to be detained without trial,·
- c. to be free from all forms of violence from either public or private sources,·
- d. not to be tortured in any way, and
- e. not to be treated or punished in a cruel, inhuman or degrading way."

[13] Freedom and security of the person goes hand in hand. Once a person is deprived of her/his freedom, such person is at the mercy of the captor. Security of the person is, in such circumstances, easily eroded by violence, torture or cruel and inhumane treatment.

[14] Being mindful of the aforesaid, section 35 of the Constitution jealously protects the rights of arrested, detained and accused persons.

[15] The following subsections of section 35 is applicable:

"35. Arrested, detained and accused persons

1. Everyone who is arrested for allegedly committing an offence has the right
 - a. to remain silent,·
 - b. ...
 - c. not to be compelled to make any confession or admission that could be used in evidence against that person;"
-
5. 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. "

- [16] The questions in the pro forma confession form echo an accused rights guaranteed in the Bill of Rights.
- [17] The moment the appellant alleged that he was assaulted by the police, magistrate Deacon should not only have terminated the interview immediately, but should also have brought the alleged conduct of the police officers to the attention of the relevant authorities.
- [18] The answers given by the appellant clearly evidenced that his constitutional rights were infringed.
- [19] The explanation by magistrate Deacon that she viewed the previous assaults and threats irrelevant for purposes of the confession does not suffice. Once a person has been subjected to cruel and inhumane treatment, the emotional anguish and fear is ingrained in the person's mind. No selfincriminating evidence can thereafter be considered as being tendered freely and voluntarily.
- [20] In the result, the court a quo erred in admitting the confession into evidence. The ruling on the admission of the confession stands to be set aside.

Evidence

- [21] Santo Alice Shongwe ("Shongwe"), the exgirlfriend of the appellant and the mother of his child, testified that the deceased was her neighbour. Shongwe testified that on the day of the incident around 17:00, she saw the appellant and her uncle walking slowly past the house of the deceased. The appellant and her uncle walked up to the corner of the street and turned into the direction of the appellant's family home.
- [22] Approximately at 19:00 a certain Mnisi walked into Shongwe's house and asked whether she had heard a shot being fired.
- [23] The prosecutor interrupted Shongwe's evidence at this stage and asked her whether she saw the appellant in the company of an unknown male on the day of the incident. In answer to the question Shongwe changed her evidence and stated that she actually saw an unknown male walking with the deceased.
- [24] Although Shongwe could initially not describe the unknown male in the appellant's company she, with some probing from the prosecutor, later on, recalled that the unknown male had a kneelength leather jacket on.
- [25] On further leading questions from the prosecutor, Shongwe recalled that the appellant phoned her after the incident and asked whether he could sleep at her place of residence. She refused.
- [26] Once again prompted by the prosecutor, Shongwe also recalled that the appellant phoned her the next day and asked her whether the deceased had passed on.

- [27] The prosecutor then told Shongwe to tell the court about the further call she received from the appellant. Shongwe could not remember and she was allowed to refresh her memory by reading the statement she made to the police.
- [28] After perusing a portion of her statement, Shongwe testified that the appellant phoned her at some stage and asked her to tell the police that he slept at her residence sometime in February. She could not recall the exact date. That concluded her evidence.
- [29] Warrant officer Nkosi testified next. He was the first officer on the scene where the shooting occurred. His evidence did not take the case against the appellant further.
- [30] The following witness, David Candy Shongwe confirmed that she saw the appellant the day of the incident in the company of an unknown male who had a black knee length leather jacket on.
- [31] Lastly, Bonisile Nhlabathi ("Nhlabathi") the granddaughter of the deceased and niece of the appellant testified. She testified that she saw the appellant and the unknown male walk past her grandmother's house on the day of the incident. At some stage, the appellant and the unknown male turned around and walked past the house again. They were talking and looking in the direction of the house.
- [32] Nhlabathi saw a white Quantum following the appellant and the unknown male. The appellant and the unknown male turned the corner and she could no longer see them. She also lost sight of the Quantum.
- [33] The next moment she saw the Quantum driving down the street and before the vehicle reached the deceased's house shots were fired. Nhlabathi testified that the unknown male came into the deceased's house and shot the deceased.
- [34] The appellant testified and denied any involvement in the shooting of the deceased.

Evaluation

- [35] The evidence on behalf of the state established that the appellant was in the company of the unknown male prior to the murder. Although being in the company of the person who on all probability murdered the deceased is suspicious, it is a far cry from establishing beyond a reasonable doubt that the appellant planned the murder.
- [36] On the admissible evidence before court the appellant was entitled to be discharged. I am mindful that the court a quo took the contents of the confession in account in convicting the appellant. Without the confession, there is, however simply not enough evidence to convict the appellant and the appeal must succeed.

ORDER

- [37] In the premises, I propose the following order:

1. The appeal is upheld.
2. The ruling of the court a quo in respect of the admissibility of the confession of the appellant is set aside and substituted with the following ruling:

"The confession is inadmissible."

3. The order of the court a quo is set aside and substituted with the following order:

"The accused is found not guilty and discharged."

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Electronically submitted therefore unsigned.

I agree.

H.M. MSIMANG

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Electronically submitted therefore

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handdown is deemed to be 17 December 2020.

DATE HEARD PER COVID19 DIRECTIVES:

23 November 2020

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 17 December 2020

APPEARANCES

Counsel for the Appellant: Advocate J.A. Venter

Instructed by:

Mjali and Zimema Attorneys

Counsel for the Respondent: Advocate C. Pruis

Instructed by:

Office of the Director of Public

Prosecutions

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Prepared on 10 October 2026 · Esheria