Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

Case no: CA801/2013
Date heard: 14.03.2014
Date delivered: 30.10.2014

In the matter between:

MQWALASELI MABHAYI **Appellant**

vs

THE STATE **Respondent**

CORAM: TSHIKI, MAKAULA JJ and HINANA AJ

FULL BENCH APPEAL JUDGMENT

SUMMARY : Applicant herein was convicted of two counts of murder as well as housebreaking with the intent to kill. In respect of the murder offences he was sentenced to life imprisonment on each count and on the count of housebreaking he was sentenced to ten years imprisonment. The Court cautioned that trial Courts should differentiate between genuine untruths or errors made by the deponent in his or her confession and those raised only during the trial yet they were recorded at his instance during the recording of the confession.

TSHIKI J:

[1] The appellant herein *Mr Mqwalaseli Mabhayi* was convicted of two counts of murder as well as one count of housebreaking with the intent to kill. In respect of the first murder count, he had killed *N. G.* a minor female on the 21st February 2009 at Toleni location in the district of Butterworth. In respect of the second murder count, the appellant on the same date, time and place mentioned in count one, murdered the second deceased, *N. G.* an adult female person. In respect of count three which is housebreaking with intent to kill, the appellant, at the same time, date and place as in counts one and two, broke and entered the house of N. G. an adult female with the intent to murder the two deceased persons in this case. The provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 were applicable in this case in that the appellant, when he committed the offences acted in concert with another person and in the furtherance of a common purpose.

[2] In respect of the first two counts of murder he was sentenced to life imprisonment on each count and in respect of the third count of housebreaking with intent to kill he was sentenced to ten (10) years imprisonment.

[3] When the appeal was argued *Mr Giqwa* appeared for the appellant and *Mr Mphephanduku* represented the State.

[4] When imposing sentence the Court *a quo* took into consideration, *inter alia*, the fact that the appellant and his co-perpetrator of the crimes had used knives or sharp instruments in murdering their victims.

[5] The appellant's grounds of appeal are based on both the conviction and sentence and are as follows:

AD CONVICTION:

[5.1] that the state relied on the evidence of a confession as well as the pointing out made by the appellant;

[5.2] that the motive for the appellant's murdering of his victims were proved to be false;

[5.3] that the contents of the same confession relied upon by the Court were found to have been incorrect for the following reasons (quoted *verbatim infra*):

> "(a) In any of the rape charges against appellant there was no complainant by the name of Phelisa as contained in the confession. The complainant in the rape case which involved Sandisa Mpini and the appellant was Andisiwe Goloza.
>
> (b) That the Gubevu woman was not a witness in a rape case of Sandisa Mpini and appellant, therefore the deceased persons could not have been killed for the reason that they were to be called as witnesses in their rape trial against the appellant and his co-accused.
>
> (c) In the statement it was alleged that the accused stabbed the young girl on the chest but according to the post-mortem report, there is no wound on the chest, and the wound closet to the chest is on the neck."
>
> (d) The police captain who recorded the appellant's confession, Captain Dlulisa, made some changes, amendments or amplifications in the confession, where in paragraphs two and three he altered the name of Monakali to that of Gubevu. It is also contended that according to Mr Dlulisa's evidence he was instructed by the accused to make those changes after having read the statement back to the accused but he failed to invite appellant to countersign those changes."

[6] In other words, according to the appellant his confession should never have been used to convict him because it was in fact false. Secondly, the changes which were effected in his confession by *Captain Dlulisa* who recorded his statement were

not initialled by both *Captain Dlulisa* and the appellant. It was only *Captain Dlulisa* who signed subsequent to changes initiated by the appellant who did so due to errors corrected in the contents of the confession.

[7] I must say though that I do not understand the relevance of the rape charges which involve *Mpini* because the appellant was never charged with rape in the proceedings in the Court *a quo*. One of the charges preferred against the appellant was murder of a person called *Gubevu* a name he mentioned in his statement to *Captain Dlulisa*.

B) AD SENTENCE

[8] According to the appellant the sentence imposed by the trial Court is out of proportion with the totality of the accepted facts in mitigation. That it fails to take into consideration the factors favourable to the appellant. These include the age of the appellant who was […..] years at the time of the offence. He had also spent time in prison awaiting his trial. All these factors were, according to the appellant, sufficient to constitute substantial and compelling circumstances which justify the imposition of a lesser sentence than that of life imprisonment imposed in respect of the first two counts.

[9] During evidence various police witnesses were called by the State to testify about how the appellant made his confession before *Captain Dlulisa* and a pointing out before *Superintendent Nkosiyane*. The evidence of these two witnesses was accepted by the trial Court on the basis that none of those witnesses had been shown to have misled the trial Court or have told the untruth relative to how the

appellant made both his confession as well as his pointing out. From his evidence the appellant could not successfully challenge the competence of the police witnesses' ability to take the confession as well as the pointing out. On the evidence of the two police witnesses *Captain Dlulisa* and *Superintendent Nkosiyane* the appellant confessed and also pointed out respectively the places and did so voluntarily and without having been influenced or forced in any manner whatsoever by the two police witnesses or any other witness for that matter. The trial Court instead found that it was in fact the appellant's evidence that was fraught with lies hence she rejected his version of events. On that basis the trial Court accepted the version of the state witnesses. It should be noted that according to the accepted evidence the appellant had shown the police witnesses the various places where he pointed to them some places where he had committed the offences. At that stage the appellant had not changed his version. At the end of the trial, the trial Court accepted the version of the police witnesses and rejected that of the appellant.

[10] It is common cause that in his testimony the appellant on many occasions had to change his version and contradicted himself. For instance, in his testimony he told the Court *a quo* that what was written by the two policemen who took statements from him did not emanate from him. His change of version on occasion during his testimony and on matters not challenged when the police witnesses were testifying show clearly that he was not being truthful to the Court *a quo*. Based on the unreliability of the appellant's testimony the trial Court rejected his version and accepted that of the State witnesses. On reading the record, I do not have reason to interfere with the trial Court's credibility findings. The trial Court was alive to every

aspect of the appellants' testimony and I cannot find any fault in her assessment of the evidence. In my view, she correctly rejected the appellant's testimony.

[11] I now have to deal with the issue of the reliability of the confession made by the appellant. Even where a confession has been found to be admissible, for it to be used in convicting the accused it has still to be determined whether it is reliable or not. (***S v Zulu and Another*** 1998 (1) SACR 7 (SCA)). This is so because the mere fact that an accused person's confession has been admitted by the Court does not always mean that he or she in fact has, on the basis only of the confession, been proved to have in fact committed the offence which he or she has confessed to have committed. He or she may have told the untruth. In ***S v Kumalo*** 1983 (2) SA 379 (A) at 383 G-H Botha JA remarked as follows:

> "In general, the danger of an innocent person freely and voluntarily confessing to a crime he did not commit is no doubt slight (R v Sikosana1960 (4) SA 723 (A) at 729C), but it is nevertheless real; and, when once it appears that a purported confession contains a material untruth, as is the position here, the need for the Court to be on its guard against the danger of the confession being false in its essence, ie as to guilt of the "confessor", is immediately more compelling. Experience in the administration of justice has shown that people occasionally do make false confessions, for a variety of reasons. Our Courts have recognised this phenomenon of human nature." (I agree with the above statement by the learned Judge of Appeal.)

[12] Section 209 of the Criminal Procedure Act 51 of 1977 (the CPA) provides as follows:

> "An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so

> confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed."

However, the fact that a confession complies with the requirements of section 209 of the CPA does not necessarily mean that the contents thereof should, without more ado be accepted as being factually true. The Court must ask itself whether it can safely rely on the material allegations made in the confession and whether the guilt of the accused has been proved beyond reasonable doubt. (***S v Blom*** 1992 (1) SACR 649 (E)).

[13] Some decided cases suggest that a pointing out of the scene of crime by the appellant in that case and or an admission by him contained in a question he put to a state witness in the course of a preparatory examination, constituted sufficient confirmation of a confession he had made to the magistrate (***S v Mbambo*** 1975 (2) SA 549 (A) at 554 C-D; ***S v Mjoli and Another*** 1981 (3) SA 1233 (A) at 1237 G; 1239 B-F, 1245 E-H).

[14] Appellant herein challenges the contents of the confession statement as being inaccurate and consequently contains untruthful information about the identity of the girl who was allegedly raped. Secondly, the statement also contains an untruth with regard to the injuries the girl sustained when she was murdered. The post-mortem report shows that the cause of death was as a result of multiple lacerations, bleeding and head injury as against what the confession reflects being that the appellant stabbed the deceased on her chest. Thirdly, according to the appellant the name of the alleged raped girl is reflected in the statement of the appellant as *Phelisa* and *N. G.*is reflected in the charge sheet. The witness *Captain Dlulisa* could not dispute the

fact that the name of the minor female who was murdered with her grandmother was *Nonelwa Gubevu*.

[15] It seems to me that this issue about incorrect names has no substance at all. I say so, because the witness *Captain Dlulisa* when he was reading back the recorded confession for the benefit of the appellant, he was alerted by the appellant to the incorrect names he initially gave to *Captain Dlulisa* which were reflected in the statement. It is for that reason that he then told *Captain Dlulisa* to change the names and reflect in the statement the correct names as they were given to him by the appellant. The correction was effected followed by the insertion of the signature by *Captain Dlulisa*. In my view, there was no necessity for the appellant to also initial the corrected error made about the names or at least the failure by the appellant to initial was not a fatal omission. This is so, because the only person who was recording at the instance of the appellant was *Captain Dlulisa*, who in his evidence does not deny making the corrections at the appellant's instance. His explanation about what had happened is to me a satisfactory one. It seems to me that the appellant is now trying to make a mountain out of a mole hill. The probabilities are such that the witness *Captain Dlulisa* must have made name changes at the instance and as a result of what the deponent told him. This is in fact proved by the fact that the names given to *Captain Dlulisa* by the appellant are consistent with the correct names of the deceased. In my view, this issue which is in any event insignificant has no substance at all. The changes in fact prove that the appellant knew the identity as well as the names of the deceased and it is highly unlikely that *Captain Dlulisa* could have known those names. At least there is no evidence to suggest so. The error about the names could likely to have been made if one has

regard to the fact that the appellant was implicated in respect of nine alleged serious crimes. After the appellant had rectified the error there was no longer a risk of a wrong conviction.

[16] About the issue of the nature of the injuries, again there is no doubt that from the evidence of the appellant in his confession they arrived at the deceaseds' homestead at about 22h00. Obviously it was at night and at a time when visibility must have been poor. This could also account for the inaccuracy on the exact part of the deceased's body where the injuries were inflicted when she was stabbed. To me it does not necessarily mean that there was a deliberate untruth on the part of the appellant.

[17] Genuine errors made by deponents who make confessions before a commissioner of oaths at the time of the recording of the confession do not necessarily amount to untruths with regard to the incorrect names given to the commissioner of oaths by the suspect who makes a confession. The genuineness of those errors as is the case herein should be judged at the time of the taking and/or recording of the confession and not at the time when such issues arise during the trial. In view of the fact that such errors about the name of a person are corrected by the deponent immediately after the statement is read back to him or her is an indication that the deponent has made a genuine error as to the identity of the person concerned. The trial Court, therefore, was alive to the possibility of being tricked into accepting such contentions as genuine untruths which may indicate that the deponent of the confession had deliberately told the untruth. In this case the probabilities show clearly that the error made by the appellant at the time of the confession, which he corrected, was genuine. However, during the trial he raised it

as a defence yet during the recording of his confession he volunteered to correct the error about the identity of the person he initially mentioned to *Captain Dlulisa*. Even during his testimony, the appellant was constrained to admit that the police, when questioning him, asked him about the death of *Ms Gubevu* who was murdered on the 21st February 2009.

[18] In this case, the appellant may later have had an afterthought with a view to juggle his defence around the fact that the confession could have been based on the untruth but this defence in my view, is not consistent with his conduct at the time when he made his statement to *Captain Dlulisa*. His conduct relative to what is recorded in the confession should be judged at the time when he made the confession and not when he testified at the trial. In any event, he does not appear to dispute that he initiated the change of the name but his contention is that he was never given the opportunity to initial the name change as *Captain Dlulisa* had done. In my view, that the appellant does not deny that he initiated the change of the name, shows clearly that there is no untruth in the whole scenario of the names. From the evidence before the trial Court there was no suggestion to *Captain Dlulisa* that the appellant's confession contained evidence which is not true. If there is any untruth in the confession of the appellant, as *Mr Giqwa* has argued, it could only be considered by the Court if it had a bearing on whether or not the appellant was the person who murdered the deceased persons in this case. Motive in such circumstances can only be considered by the Court as material if it is relevant to the decision whether or not the deponent, despite what he has said in his confession, but for the motive it is doubtful whether or not the appellant murdered the deceased persons or anyone of them in this case. (***S v Blom*** *supra*). My conclusion in this case is that the motive for

the appellant in murdering the deceased was immaterial in determining the guilt of the appellant. In other words, it had nothing to do with proof of the commission of the offences of which the appellant was convicted herein. (***S v Kumalo*** 1983 (2) SA 379 (A)).

[19] In ***S v Kumalo*** *supra* at 384 G-H it was held that intra-judicial admissions may be used to confirm an accused's confession. This state of affairs was also confirmed in the judgment of this division in ***S v Rossouw*** 1994 (1) SACR 626 (E).

[20] In the present case, the appellant himself made a pointing out of the place where he murdered the deceased. This was, therefore, a confirmation of the confession because he pointed out the place where the deceased persons were murdered by him and his co-perpetrator. Both the confession and the pointing out by the appellant were admitted by the trial Court. From what I have already said above, I do not see any reason why I should interfere with the trial Court's conclusion that the two statements made by the appellant, the confession and the pointing out, were not correctly admitted. I have already concluded that the name of the deceased which was given to *Captain Dlulisa* by the appellant could not be regarded as a deliberate untruth. The appellant had in any event corrected the name and gave *Captain Dlulisa* the correct name. This the appellant did after his statement was read back to him by *Captain Dlulisa*. The name mentioned which replaced that earlier given to *Captain Dlulisa* was in fact the surname of the deceased persons who according to what is recorded in the confession were murdered by the appellant and his co-perpetrator. Authorities are all *ad idem* on the fact that one of the requirements for the admission of a confession is that the confession must be

confirmed by other evidence (***S v Mjoli and Another*** 1981 (3) SA 1233 (A)). See also section 209 of the Criminal Procedure Act 51 of 1977 which requires the confirmation of the confession in a material respect. In this case, the material respect will be that the identified deceased was murdered by the appellant after which he went to point out the place being the home of the deceased where the appellant murdered the deceased with his co-perpetrator.

[21] I certainly do not agree with the submission made on behalf of the appellant by *Mr Giqwa* that on the evidence before us there is a risk of a conviction of an innocent person. In my view, the Court *a quo* applied its mind to the requirements related to the admissibility of the confession before her and she has not misdirected herself in convicting the appellant. In fact, the appellant was proved to have been a pathetic liar when he gave evidence and the record speaks for itself in this regard.

[22] With respect to sentence the appellant was convicted of serious offences. He and his co-perpetrator went to the deceased home with a view to silence them forever by killing them so that they do not testify against them in the rape trial that was to be in progress in the future. Their victims were none other than two female persons, an old woman and a young child both closely related to each other. The deceased could not defend themselves against the possibly masculine bodied culprits. They were attacked at night and at a time when they could not have expected to be attacked.

[23] In the guidelines provided for in the judgment in ***S v Malgas*** 2001 (1) SACR 469 (SCA) at para [25] Marais JA formulated the following guidelines when sentencing offenders in serious offences:

> "B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
>
> C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
>
> D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

[24] The seriousness of the offences which were committed by the appellant deserve severe censure which it received in the Court *a quo*. Killing a person for the reason that you do not want him or her to testify against you should always be regarded as a very serious offence and it should be discouraged by imposing an appropriate sentence. In this case, I do not think that a sentence less than the one imposed by the trial Court would have served the interests of justice. In my view, there is no merit in the appeal against sentence either.

[25] In the result, I make the following order:

[25.1] The appeal is hereby dismissed and the conviction and sentence of the appellant are hereby confirmed.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Makaula J:

I agree.

_____
M. MAKAULA
JUDGE OF THE HIGH COURT

Hinana AJ:

I agree.

_____
M.N. HINANA
ACTING JUDGE OF THE HIGH COURT

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