

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



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No. CA&R 119/2022

Regional Court Case No. RCB 2121

Heard on: 19 February 2024

Date delivered: 10 June 2024

In the matter between:

D[...] Y[...]

Appellant

And

THE STATE

Respondent

JUDGMENT

MAJIKI J:

[1] The appellant was charged with and convicted of offences relating to the murder of his partenal nephew, his brother's wife's two year old son (the

deceased). He pleaded not guilty to three counts, murder, rape and defeating the ends of justice. Despite the fact that in the counts of murder and rape, the state invoked the provisions of section 51(1) of Criminal Law Amendment Act 105 of 1997 he was found guilty with section 51(2) in the count of murder. He was sentenced to fifteen (15) years, life imprisonment and ten (10) years respectively. All the sentences were ordered to run concurrently with the life sentence in the count of rape. The appellant appeals against conviction, the respondent opposes the appeal and supports the conviction.

[2] The grounds of appeal are summarily that the appellant's right to a fair trial was violated. The magistrate was biased; he descended the arena. Despite the fact that the appellant's attorney recorded that instructions were not to disclose the basis of his defence, the court insisted that she makes some admissions. Further, the trial within a trial to determine the admissibility of a confession allegedly made by the appellant was unprocedural.

BACKGROUND

[3] On the date of the incident the deceased was playing with other children at the appellant's parental home. The deceased went missing. He was recovered from a nearby river already dead, he had also been raped anally. Seven members of the community confronted the appellant and he admitted that he killed the deceased.

[4] The conduct of the magistrate during the hearing is disconcerting, and requires some scrutiny. It is for that reason that the evidence is restated to a great extent.

TRIAL PROCEEDINGS

[5] During the plea proceedings when the appellant's legal representative explained that the appellant was reserving the outline of his defence, the magistrate stated:

'as much as I respect the election of the accused, but when he just say that he reserve[d] the basis of his defence, he then puts the state in a position where it has to prove whether the accused knows the victim in this matter, whether they met all, there are so many questions that have to be answered, and it has the effect of wasting valuable time ... I think it is just the effects of that, because we start from scratch, trying to link the accused with the alleged victim, and I observe that for instance, the alleged victim has the same surname with the accused'.

The magistrate explained that the process was not to get the appellant to implicate himself but was meant to minimise the issues.

[6] The appellant's legal representative then recorded that the appellant knew the deceased; in the afternoon of the day of the incident the deceased was left with the appellant at the latter's parental home, playing with other children; the appellant left for his own homestead; on the next day he was confronted about the missing deceased; he did not know what had happened to the deceased and never saw the deceased again; he knew nothing about the rape or death of the deceased.

[7] In proving its case the state called four (4) witnesses, three (3) witnesses testified about the admission made by the appellant to the members of the community. The other witness testified in relation to a confession allegedly made by the appellant.

[8] Mr N[...]1's evidence about the admission was led without objection from the appellant's legal representative, despite the fact that the appellant allegedly incriminated himself. According to the witness he was the brother

of the appellant's father, the appellant was therefore his son. He said he and the deceased's mother realised around 13h00 that the deceased was missing. The deceased was not able to walk for long alone. Upon that realisation people, elders and women were called to his family home. The deceased's mother reported that when the appellant was called to the gathering, he said he was tired and was sleeping. Seven men were subsequently appointed to investigate the matter and confront the appellant. Without any force used or threats, the appellant admitted that he killed the deceased. He, as the appellant's father, suggested to the appellant that he hands himself to the police. The appellant did that.

[9] Mr N[...]1 only mentioned that the appellant admitted that he raped the deceased in cross examination. However, he became very confused when that was interrogated further in re-examination. He also said he did not remember accompanying the appellant to a traditional doctor in Mzamba suffering mental disturbance (sic). He denied that he attended a gathering together with the appellant and a traditional healer, where the appellant was made to admit the offences.

[10] The two other witnesses on the aspect of admission, Messrs N[...]2 and N[...]3 confirmed that the appellant admitted that he killed the deceased and threw him in the river, without being forced or threatened. The one witness was among the seven men that confronted the appellant. The other witness is the sub-headman. He said the questioning of the appellant was part of their investigation as to what happened to the deceased. It took place in his homestead. They confronted him because as the deceased's close relative, he did not participate in the search of the deceased. He also used to carry the children on his back.

[11] During the cross examination of Mr N[...]2 it was suggested that the appellant made the admission after, his explanation that he failed to attend the first meeting because he was tired, was not accepted. He felt cornered and decided to admit for the sake of admitting. The witness was adamant that the appellant was even in a sitting position when he spoke, he was not forced. The issue of the alleged admission will be reverted to during the analysis of the evidence.

[12] Captain Nzimakhwe from Port Edward, KwaZulu Natal confirmed that he obtained a confession statement from the appellant at Mzamba police station. Again there was no objection to the leading of the evidence of the confession. There seems to be no concern in the manner in which that process was undertaken. The appellant confirmed that he never told Captain Nzimakhwe that the police told him what to say, that he was tortured and that he was threatened. No questions were asked on behalf of the appellant. Instead the prosecutor said he was closing the state case in respect of the statement.

[13] After Captain Nzimakhwe's evidence was led and was about to be called upon to read the statement, the appellant's legal representative informed court that she intended to call the appellant to answer. In a strange turn of events the magistrate said "we are already in a trial within a trial, ask questions from the witness ... aimed to show the circumstances under which the statement was taken".

[14] The appellant testified regarding the statement. He confirmed that he was tortured by being assaulted and suffocated with a latex glove in order to agree to make a statement. He was further threatened that he should not disclose that he was tortured. The police told him what to say in the

confession, the police threatened to kill him upon return from the cells, if he did not record what they told him. Despite the fact that his evidence in cross-examination was not so clear. He repeated that the contents of the confession were dictated to him by police from stock unit in Mzamba. He also said that he had no knowledge about the retrieval of the body of the deceased.

[15] The magistrate's reasons in his judgment in the trial within a trial emphasized that the appellant did not tell Captain Nzimakhwe that he was tortured and assaulted. He said the bold statement and description of how the assault unfolded, without evidence to back it up, cannot lead to the court's rejection of the statement. He may have heard about how assaults are perpetuated from other people or he got it from a movie.

[16] The magistrate ruled that the statement was admissible. Before the statement was read into the record, the magistrate asked the legal representative if she had objection in the statement being admitted to which she said she had none.

[17] The appellant testified in his defence in the main case. He said he was confronted by members of the community about why he threw the deceased's body in the river. He denied those allegations. He eventually admitted because he was scared that he would be assaulted. They said the deceased had missing body parts. He made a confession because he had been tortured by the police. He then learnt from the police that the deceased had no missing parts but was raped.

[18] The issue for the appeal is whether cumulatively, on the grounds regarding how the trial was conducted resulted in an unfair trial to the appellant.

[19] For reasons that will become apparent below the sequence in dealing with issues will be to address the plea outline, confession and finally the admissions.

EVALUATION

OUTLINE OF PLEA

[20] The magistrate insisted that the appellant disclose the basis of his defence, despite the appellant's clear indication that he wanted to reserve it. In his judgment the magistrate among others, formulated the basis of his inferential reasoning on the fact that the appellant had been with the deceased before his disappearance. This emerged from the plea statement only. The evidence, as also correctly recorded by the magistrate, was that Mr N[...]1 saw the appellant at the appellant's parental home, where the deceased was, before the deceased disappeared.

[21] Section 115 of the Criminal Procedure Act 51 of 1977 (the CPA) provides:

- '(1) where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.
- 2 (a) where an accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by plea, the court may question the accused in order to establish which allegations in the charge sheet are in dispute.' (emphasis mine).

[22] From what the magistrate asked, he does not appear to have given the appellant any option but to make the plea explanation. In **S v Molyi** 1978 (1) SA 516 (O) 520 E it was held that the questioning in terms of section 115 can only be used for a limited purpose, namely the determination of the nature and extent of the dispute as opposed to enquiries concerning facts in proof of the issues. Herein, that the appellant was with the deceased falls on the facts that, if not formally admitted, the state had to prove. Only one witness testified that the appellant was seen at the homestead where the deceased was, before his disappearance. There was no evidence that he was with the deceased.

In **S v Eke** 2016 (1) SACR 135 at paragraph 31 the full court explained the status of a plea explanation. The court stated:

‘**Bhamjee’s** case (**S v Bhamjee** 1993 (1) SACR 62 7W) and cases cited in it do not hold that a plea explanation is evidence. Indeed, MJ Strydom J stated that what the accused 'said in his explanation of plea is not evidence' but a 'disclosure of what he is putting in issue'. What these cases say is no more than that a plea explanation is evidential material because it is an unsworn statement made by an accused in which he or she discloses what is in issue between him or her and the state. MJ Strydom J summed the position up by stating that in cases in which an accused does not testify, while a plea explanation 'is not on the same footing as evidence having been given on oath', it should nonetheless be considered 'in finally deciding whether the state had proved its case beyond a reasonable doubt'. (brackets mine)

[23] In this court’s view it was irregular for the magistrate to insist on details of a plea explanation that go beyond the nature and extent of the dispute, moreso, after the appellant had exercised his choice to the contrary. Further, in his inferential reasoning he considered the statement that the appellant was with the deceased as a fact. However, I do not agree with the appellant that

such irregularity was an indication of bias. It is also not of such magnitude so as to vitiate the proceedings. This court will have to evaluate the evidence afresh to its exclusion.

ADMISSIBILITY OF THE CONFESSION

[24] With regard to confession the prosecutor recorded that the state was to lead such evidence. The appellant's legal representative was ill-advised by failing to object to such evidence and by not challenging the evidence relating to circumstances surrounding the minuting of the statement. The record of the proceedings after the state indicated that it was applying for the statement to be read into the record reads:

'COURT : Ms Mzamo?

MS MZAMO : Your Worship. I wish to call the accused person to answer.

COURT : Sir,

MS MZAMO : [Indistinct]

COURT : We are already in a trial-within-a-trial, ask questions from the witness. You must remember that the questions are aimed to show that the circumstances under which the statement was taken.

MS MZAMO : As the Court pleases.

MS MZAMO : Sir, the accused person is disputing that he made a statement?

COURT : Okay, we are not intending to go back, because on the basis that you said you had no questions, the State closed the State case we cannot go back to you then, in order to find your indication that you have question.

MS MZAMO : Thank you, Your Worship. Your Worship, I am requesting to – opening of the short examination, Your Worship, ... [intervenes].

MS MZAMO

CROSS-EXAMINATION

COURT : Are you okay?

MS MZAMO : No, it is just that we have been through this procedure before, that if there is questions around the taking of the statement, then you ask those questions, with a view to show that there are some abnormalities in the manner, in the manner in which the statement was taken, now you seem to be confused, that is why I am asking that because you - because you have all of this since ... [inaudible] one of them. So your instructions are to – if I may understand, your instructions are to ask the witness questions?

MS MZAMO : Yes

COURT : Regarding how the statement was taken?

MS MZAMO : Regarding the issue of statement.

COURT : Right, no problem at all.

MS MZAMO : Sir, according to my instructions, he did not make the statement freely and voluntarily.

MR NZIMAKHWE: I am disputing that, he was never forced by anybody.

COURT : Yes.

MS MZAMO : He was told what to say to you, that was not done by himself.

MR NZIMAKHWE: I first asked – I first asked him that and his response was that he was never forced by anybody to make a statement and that is what he was about to tell me, is something that he had earlier told his community, which I did not know.

MS MZAMO : Thank you, Your Worship, no further questions.

COURT : Any re-examination Mr Vinindwa?

PROSECUTOR : No re-examination, Your Worship.)

[25] The appellant's confirmation of what Captain Nzimakhwe testified about, that he never told him about assault, threat and police dictation of what he should say was correct. However, there was no opportunity for the appellant to place those allegations to the alleged police officers. The state did not place its version as to what happened before the appellant was taken to Captain Nzimakhwe. As matters stand, albeit belatedly, there is a record of

the appellant's evidence, testifying about being tortured in detail and dictated to as to what to say. There was no basis for the court *a quo* to make the finding that what he said was not true. No contrary version was placed before court to evaluate the appellant's version, of involuntariness in making the confession, against. The magistrate speculated that the appellant may have heard from other people about how the police perpetrated tortures.

[26] Over and above the requirements of section 35(5) of the Constitution of the Republic of South Africa, 1996, the court must be satisfied that the statement was made freely and voluntarily in his sound and sober senses. Indeed, the legal representative did not place the appellant's version timeously. Nevertheless, at the stage she raised it, the court could still properly entertain it and let the state consider its position regarding how it would deal with it. The confession cannot be said to have been regularly admitted in the circumstances. The court *a quo* erred in finding that it was freely and voluntarily made. The confession ought not to be admitted as evidence against the appellant.

THE ADMISSION

[27] The circumstances relating to the evidence of the three (3) witnesses about the admissions differ. Despite the fact that the appellant did not object to the leading of such evidence, the said witnesses were asked questions relating to the appellant's version about involuntariness of the making of admission. The magistrate astutely summarised the evidence of the three (3) witnesses. The effect of that evidence being that the appellant admitted to killing the deceased by strangling him. Further, he correctly analysed the circumstantial evidence, except for the inclusion of what flowed from the plea explanation. This court will disregard the facts around the appellant having been with the deceased, in its evaluation of the evidence.

[28] The circumstantial evidence to which the inferential reasoning ought to apply to is summarised below. That the appellant was seen by Mr N[...] at his parental home before the deceased disappeared; the deceased was at the said homestead before his disappearance; the deceased could not walk for some distance on his own and that after he disappeared the appellant did not come when he was called to a meeting about the deceased's disappearance, despite his known fondness of the children.

[29] Further, the post-mortem report indicated that the deceased's death was caused 'asphyxia (respiratory arrest) caused by airway compression caused by manual suffocation'. The appellant admitted to killing the deceased by strangling him. The magistrate correctly applied section 219 A of the CPA regarding extra judicial admissions. His finding that the admissions were voluntarily made cannot be faulted. The court *a quo* also correctly applied the two cardinal rules of logic as enunciated in **R v Blom** 1939 AD 188 at 202-203 applicable in reasoning by inference, which are:

- '1. The inference sought to be drawn must be consistent with proved facts. If not then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn'.

[30] In this court's view the approach by the magistrate and his reasoning is correct. The cause of the deceased's death is consistent with the explanation by the appellant in his admission. In the light of this evidence and the circumstantial one, the version by the appellant that he did not kill or admit to killing the deceased could not be reasonably probably true. Further, his reasons for admission to the community differed. The version that was

suggested to the witnesses was that he felt cornered when he was not believed. When he testified, he said he feared that he was going to be assaulted. The only reasonable inference to the facts together with his admission prove that he did kill the deceased.

[31] The appellant did not admit the rape of the deceased. However, considering that the deceased was raped before being killed, it is not probable that a two year child who could not walk for long on his own could have been raped by a different person and subsequently meet his death in the hands of the appellant. The only reasonable inference that could be drawn is that the appellant raped the deceased and thereafter killed him to cover up what he had done to the deceased.

[32] This court is of the view that, even without the confession there is sufficient evidence to sustain the conviction of the appellant for the crimes he was charged with.

In the result,

1. The appeal is hereby dismissed.

B MAJIKI

JUDGE OF THE HIGH COURT

I agree

D PITT
ACTING JUDGE OF THE HIGH COURT

Appearances:

Appellant's counsel : Mr X Babane

Instructed by : Legal Aid South Africa
Mthatha Local Office
No. 96 PRD Building
Sutherland Street
MTHATHA

Respondent's Counsel : Ms Mazamisa

Instructed by : Director of Public Prosecutions
Broadcast House
Fort Gale
MTHATHA