THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 98/05

Reportable

In the matter between :

SAMSON SHONISANI RALUKUKWE
APPELLANT

and

THE STATE
RESPONDENT

CORAM : CAMERON, CONRADIE *et* CLOETE JJA

HEARD : 16 MAY 2006

DELIVERED : 26 MAY 2006

Summary: Criminal Procedure Act, 51 of 1977, s 291; Law of Evidence Amendment Act, 45 of 1988, s 3:
A confession of one accused cannot be used against a co-accused; an admission can, provided the application to admit it in evidence is made timeously; a confession, and an admission by a co-accused not admitted in evidence, must be left entirely out of account.

Neutral citation: This judgment may be referred to as Ralukukwe v S [2006] SCA 64 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] On 27 March 2000 the appellant and five others were convicted by the Venda High Court of murder and of robbery with aggravating circumstances. The appellant was subsequently sentenced to life imprisonment on the murder charge and to fifteen years' imprisonment on the robbery charge. The trial judge (Hetisani J) refused leave to appeal and the appeal is accordingly with the leave of this court.

[2] The admissible evidence against the appellant was to the following effect. On 15 November 1998 accused 1 travelled with accused 2, 3, 4 and 5 from the Reef to Venda in a white BMW with GP number plates. Accused 1's purpose in undertaking the journey was, according to him, to make enquiries from the appellant, who owned a security business, about tender proposals for the provision of security officers in Venda. The purpose of accused 2 and 3 was, according to them, to visit a traditional healer; this evidence was rejected by the trial court. Accused 4 and 5 did not give evidence. The appellant, who was accused 6, said that he met with his co-accused on 15 November at his office in Sibasa for the purpose stated by accused 1.

[3] After the meeting, the appellant made arrangements for accused 1, 2 and 3 to stay overnight at an hotel in the area. The appellant went personally to more than one establishment and he himself may have paid for their accommodation in whole or in part. Accused 4 and 5 stayed the night with the appellant at his own home.

[4] Early the following morning accused 1 drove to Giyani in the BMW with accused 2 and 3. All three of them testified that they began to experience mechanical problems with the BMW. On their way back from Giyani, they came across the appellant who was driving his light delivery van with his wife on the front seat and accused 4 and 5 on the back. According to accused 1, this meeting was purely coincidental; he told the appellant of the problems he was experiencing with the BMW; and the appellant guided him to the premises of the deceased at Muraga where the appellant said they would find a mechanic. The deceased was indeed a

mechanic. The appellant also said that the meeting with accused 1, 2 and 3 was coincidental, but he said that it took place on the road outside the deceased's premises and he was corroborated by his wife on this point. The appellant denied pointing out the premises of the deceased to accused 1 for any purpose; on his version he had a completely pointless conversation with accused 1 before driving away.

[5] After the two groups parted ways outside the deceased's premises, the appellant drove to Sibasa with accused 4 and 5. Accused 1, armed (to the knowledge of accused 2 and 3) with a firearm, and accused 2 went into the yard of the deceased's premises. Accused 3 stayed outside in the BMW. In the yard accused 1 asked two employees of the deceased where he would find a mechanic, as he was experiencing car problems. The employees told accused 1 that the person he was looking for was in the house. Accused 1 and 2 went to the house and repeated their enquiry, but the deceased's wife told them that the deceased was not at home (which was not true; he was sleeping in the main bedroom of the house). Accused 1 and 2 then left the premises, as did the two employees; but accused 1 and 2 returned almost immediately and asked the deceased's wife if they could use the telephone, which request she refused. An argument ensued between accused 1 and the deceased's wife in the kitchen of the house during the course of which accused 1 fired a shot. The deceased's wife then ran up the passage to the bedroom where the deceased had been sleeping. The deceased appeared, holding a firearm. Accused 1 fired a number of shots at him, fatally wounding him. Accused 1's version that he acted in self defence was rejected by the trial court.

[6] Accused 1 then drove accused 2 and 3 to Sibasa in the BMW and parked in front of the post office. Many policemen were in the area; they had been alerted to what had happened at the deceased's premises and they were on the lookout for a white BMW with GP number plates, and its occupants. One of these policemen, Sergeant Madzungunya, gave the following evidence. He said that he saw the appellant outside the Ramakulukusha building with a person he did not identify. The

appellant was talking on a cellular telephone and he overheard the appellant say that things were bad; that the police were all over the place; and that he wanted to hide his people behind the Ramakulukusha building. The appellant then beckoned to accused 4 and 5 and sent them behind the building, where they hid away and where they were subsequently arrested. Before accused 4 and 5 were arrested, according to Sergeant Madzungunya, he went into the Ramakulukusha building and overheard accused 1 making a telephone call during the course of which accused 1 said that he did not see anyone. Shortly thereafter accused 1 was arrested in Sibasa. So were accused 2, who was found in possession of the deceased's firearm, and accused 3, who attempted to throw away a 9mm Pietro Beretta firearm that the ballistic evidence established had been used to shoot the deceased.

[7] On 19 November 1998 accused 1 made a statement to the magistrate at Thohoyandou. In the statement accused 1 said inter alia that on 15 November he and the other accused he had conveyed to Venda met the appellant at the appellant's office in Sibasa; that at this meeting they planned how they would rob a bank at Sibasa the following day; that the appellant told the rest of them that they could obtain a vehicle for use during the robbery from the deceased's premises; and that the appellant had handed him a Pietro Beretta firearm. The statement was admitted after a trial within a trial, but the parts to which I have referred were repudiated by accused 1 when he testified in his defence: according to him, they were fabrications by the police which he repeated before the magistrate because he had been tortured by the police.

[8] Before us, the appellant's counsel sought to have accused 1's statement excluded in evidence against his client because of the provisions of s 219 of the Criminal Procedure Act, 51 of 1977, which reads:

'No confession made by any person shall be admissible as evidence against another person.'

On the other hand, counsel representing the State sought to have the statement admitted in terms of the provisions of s 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988 ('the 1988 Act') which provides as follows:

'3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless ─

…

(c) the court, having regard to ─

(i) the nature of the proceedings;
(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail;
(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

[9] The Criminal Procedure Act does not define what a 'confession' is. In *R v Becker*[1] De Villiers ACJ construed s 273 of the Criminal Procedure and Evidence Act, 31 of 1917, which dealt with the admissibility of confessions. In doing so the learned acting chief justice considered several other sections of that Act including s 286 which provided that a court or jury trying a person for any offence might convict him of such offence solely on his "confession of that offence" if proved to the satisfaction of the court, in spite of the fact that the confession was not confirmed by other evidence ─ subject only to the requirement that the fact that the offence had actually been committed, was proved by evidence *aliunde*. Having considered s 286, the learned acting chief justice continued:[2]

'What is obviously contemplated is that a court or jury should be entitled to convict an accused person in these circumstances only if there is an unequivocal acknowledgment of his guilt, the equivalent of a plea of guilty before a court of law. The admission by an accused of facts which, when carefully scrutinised and, may be, laboriously pieced together, may lead to the inference of guilt on the part of the accused, however consonant that may be with the meaning of the term "confession" in the abstract, is not a confession within the meaning of the Act. To look upon such a statement as equivalent to a plea of guilty would be most dangerous. The legislature itself has supplied the test which has to be applied to extra-judicial confessions, namely whether the acknowledgement of guilt

[1] 1929 AD 167 at 171-2.

[2] At 171-2. The punctuation in the 1929 AD law report does not accord with the punctuation in the original judgment filed in the archives of this court. The passage quoted retains the original punctuation.

on the part of the accused is such that, if made in a court of law, it would have amounted to a plea of guilty.'

It was therefore the view of De Villiers ACJ that 'confession' should be given the same meaning wherever it appeared in the Act; and that for a statement to qualify as a confession, and therefore to be subject to the provisions of s 273 which governed its admissibility, every element of the offence charged had to be admitted. This approach has been applied time and again in this court and in provincial divisions; and *Becker's* case has been cited by the Constitutional Court[3] as authority for the proposition that:

'A confession by definition is an admission of all the elements of the offence charged, a full acknowledgement of guilt.'

[10] The Criminal Procedure Act lays down less stringent requirements in s 219A for the admissibility of an admission, and a distinction between the two is drawn in express terms in subsection 1 which begins:

'Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence . . .'.

The Criminal Procedure Act contains no section, corresponding to s 219, that prohibits the use of an admission by one accused against another. The consequence is that such an admission, which constitutes hearsay evidence as defined in subsection 3(4)[4] of the 1988 Act, can be used against a co-accused if it is admitted in terms of subsection 3(1) of that Act: *S v Ndhlovu*;[5] *Molimi v S*;[6] whereas a confession cannot be admitted against a co-accused because of the provisions of s 219 of the Criminal Procedure Act read with the preamble to the 1988 Act ('subject to the provisions of any other law') and subsection 3(2) of the latter Act, which provides:

[3] *S v Zuma* 1995 (1) SACR 568 (CC) para 27.

[4] The relevant part of that subsection reads as follows:
'For the purposes of this section ─
"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

[5] 2002 (2) SACR 325 (SCA).

[6] [2006] SCA 38 (RSA) unreported judgment delivered on 29 March 2006.

'The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.'[7]

[11] The justification for the approach which continues to confine the operation of s 219 to confessions narrowly construed is not hard to find. Courts are reluctant to exclude evidence when the interests of justice ─ the touchstone for the admission of hearsay evidence in terms of s 3(1) ─ require its admission.

[12] I return to the facts of the present appeal. The statement made by accused 1 does not satisfy the requirements set out in *Becker*. On the contrary, it suggests that accused 1 was justified in shooting the deceased because the deceased aimed his firearm at accused 1 after accused 1 had told him to drop it. Section 219 of the Criminal Procedure Act is accordingly not applicable and the argument on behalf of the appellant based on that section is without merit.

[13] The attempt by counsel representing the State to rely on s 3(1) of the 1988 Act is equally without merit. In contrast to both *Ndhlovu*[8] and *Molimi*[9] there was no attempt whatever to invoke that section during the course of the trial; it was never referred to at any stage of the proceedings. The appellant was never called upon to deal with the contents of accused 1's statement and he did not do so. To admit the statement in evidence against the appellant at this stage of the proceedings would cause him manifest prejudice.[10] It is plainly in the interests of justice that the guilty should be punished; but it is equally plainly in the interests of justice, and a constitutional requirement,[11] that accused persons should receive a fair trial.

[14] The statement made by accused 1 must accordingly be left entirely out of account in determining the guilt of the appellant. It cannot be used even indirectly as

[7] *S v Makeba* 2003 (2) SACR 128 (SCA) para 14.
[8] Above, n 5.
[9] Above, n 6.
[10] cf *S v Ramavhale* 1966 (1) SACR 639 (SCA) at 650h-651h.
[11] In terms of s 35(3) of the Constitution.

part of a chain of inferences drawn against the appellant or as corroboration of other evidence: *R v Kohlinfila Qwabe*[12]; *R v Baartman*;[13] *S v Serobe*;[14] *S v Makeba*.[15] The cases to which reference has just been made deal with the position where the statement by a co-accused is a confession; but the position is the same where the statement contains admissions falling short of a confession ─ see *Nkosi & another v R*[16] discussed and applied in *Baartman*.[17] The reason is, as Cameron JA said in *Ndlovu*,[18] 'Hearsay not admitted in accordance with [the provisions of s 3(1) of 1988 Act] is not evidence at all.'

[15] Without the statement of accused 1, there was no case against the appellant. The real reason why the accused met at the appellant's office the day before the deceased was killed and robbed, and the reason why the appellant provided accommodation for the others, did not emerge from the evidence admissible against the appellant. There is no admissible evidence to suggest that the appellant pointed out the deceased's premises to accused 1 (assuming, in favour of the State, that he did) with the intention that the deceased should be killed or robbed of his firearm or anything else, or to suggest that the appellant foresaw either of these possibilities. There is not even admissible evidence to show that the appellant knew that accused 1 was armed; nor can it be inferred that he must have known this, because they intended robbing a bank in Sibasa, inasmuch as there was no evidence admissible against the appellant which established that this was their intention. Indeed, the evidence admissible against the appellant suggests that the purpose for which accused 1 went to the deceased's premises was because he needed a mechanic. It is pure speculation, on the admissible evidence, to suggest that accused 1 went

[12] 1939 AD 255 at 260-3.

[13] 1960 (3) SA 535 (A) at 542B-E.

[14] 1968 (4) SA 420 (A) at 425A-H.

[15] Above, n 7, at para 14.

[16] 1950 (1) PH H91 (A). The statement of the first appellant, which was wrongly used to convict the second appellant, did not amount to the confession. It was in fact exculpatory inasmuch as the first appellant said she had no knowledge that the medicine which the second appellant gave her and which she put into the deceased's milk, was poison ─ see p 172 of the PH report.

[17] Above, n 13 at 542E-543A where the case is cited as *R v Nkosi and Zulu* but the year of the law report is incorrectly given as 1959 ─ the mistake does not appear in the original judgment filed in the archives of this court.

[18] Above, n 5 at para 14.

there to kill or rob the deceased of a vehicle in accordance with a pre-arranged plan to which the appellant was a party. Even if it be accepted that the appellant lied about pointing out the deceased's premises to accused 1, this does not necessarily lead to an inference of guilt; the lie could equally have been prompted by a desire to distance himself from the murder and robbery which took place there even although he did not foresee the possibility that either might occur. As Smalberger AJA said in *S v Mtsweni*:[19]

'By die beoordeling van leuenagtige getuienis deur 'n beskuldigde moet daar, onder meer, gelet word op:

...

(d) Die neiging wat by sommige mense mag ontstaan om die waarheid te ontken uit vrees dat hulle by 'n misdaad betrek gaan word . . . '.

The evidence of Sergeant Madzungunya that after the deceased had been killed and robbed of his firearm, the appellant hid accused 4 and 5 behind a building in Sibasa takes the matter no further, even assuming that the appellant and accused 1 were speaking to each other during the telephone conversations overheard by Sergeant Madzungunya. This evidence cannot serve as a foundation for a finding that the appellant knew at that stage that the deceased had been killed and robbed, much less that he intended or foresaw in advance that this might happen – whether as an end in itself, or in the course of some nefarious plan to which the appellant was a party and which had not yet reached fruition. In short, considering the evidence admissible against the appellant in its totality, there is nothing which establishes that the appellant had the necessary *mens rea* to commit either of the offences with which he was charged, nor is there anything which establishes that he shared a common purpose with accused 1 to commit them.

[16] Counsel representing the State urged upon us during the hearing of the appeal that proof beyond a reasonable doubt does not mean proof beyond all doubt, but on the evidence admissible against the appellant there is merely a suspicion as to his guilt and this does not suffice for a conviction. The appellant's appeal must accordingly succeed.

[17] On the above analysis, and to put the position at its lowest, it would seem that accused 4 and 5 may also have been wrongly convicted. Counsel representing the State on appeal could point to no additional facts which would put them in a different

[19] 1985 (1) SA 590 (A) at 594B-D.

position to the appellant. I would accordingly request the Venda and Bloemfontein Justice Centres, which represented the appellant in this appeal, to apply for leave to appeal on behalf of accused 4 and 5 as a matter of urgency once the necessary powers of attorney have been obtained. It would be desirable, particularly in view of the length of the record, for any appeal by accused 4 and 5 to be heard by this court as presently constituted and we have retained our copies of the record to obviate the expense of a new record being prepared.

[18] In a matter such as the present, the remarks of Watermeyer JA in *R v Kohlinfila Qwabe*[20] are apposite:

> 'I am aware that in coming to a decision on the question whether an accused person has committed the crime with which he is charged, it is exceedingly difficult for the person called upon to decide that question to discard from consideration facts and circumstances which, though inadmissible as evidence, have nevertheless been brought to his knowledge. It is a difficult task even for the trained judicial mind . . .'.

The learned trial judge would have been greatly assisted in this task had he determined the facts found proved against each accused on the basis of the evidence admissible against him.

[19] The appeal is upheld. The conviction of the appellant and the sentence imposed on him are set aside.

_____

T D CLOETE
JUDGE OF APPEAL

Concur: Cameron JA

Conradie JA

[20] Above, n 12 at 262-3.