SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 543/2013

Reportable

In the matter between:

TAKALANI DAVID MALIGA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Maliga v The State* (543/13) [2014] ZASCA 161 (01 October 2014).

Coram: Bosielo, Pillay JJA et Schoeman AJA

Heard: **11 September 2014**

Delivered: **01 October 2014**

Summary: Murder – Inadmissible statements admitted – Relied upon to dismiss application for discharge after State's case closed – Appellant lured into testifying because of that – Convicted – But for inadmissible statements application for discharge ought to have been granted – Conviction and sentence set aside.

Trial – Without forgoing objectivity, presiding officers are obliged to manage proceedings in order to achieve a fair and just conclusion – S 35 of the Constitution of South Africa, 1996 obliges all officers of the court to contribute to the proper administration of justice – Presiding officer obliged to discharge an accused before he testifies if State has not made out a prima facie case for him to answer, whether represented or not.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Lukoto J sitting as court of first instance)

1 The appeal is allowed and the conviction and sentence set aside.
2 The registrar of this court is directed to send a copy of this judgment to:
(a) The National Director of Public Prosecutions, Pretoria;
(b) The Director of Public Prosecutions, Thohoyandou; and
(c) Legal Aid South Africa, Thohoyandou.

JUDGMENT

Pillay JA (Bosielo JA and Schoeman AJA Concurring)

[1] The appellant and Eunice Matodzi Maliga (the deceased) were husband and wife. On 18 February 2000, at about 9 am, the deceased was fatally wounded by a gunshot during a domestic argument between the two of them. They were alone at their home at Tshino Residential Area, in the District of Vuwani. The appellant was subsequently charged with murder in the High Court of South Africa, Venda Provincial Division on 19 January 2000, before Lukoto J. He was convicted of murder and sentenced to 48 years' imprisonment. The appeal is with the leave of the court below and is directed at both conviction and sentence.

[2] At the time of the incident, the appellant had been employed by the South African National Defence Force for approximately 10 years. He was stationed at Potchefstroom under 12 SAI Battalion. He used to commute home regularly. There had been tension between them over some period relating to the appellant's

suspicions as to the legitimacy of their last born child and also maintenance for the deceased and the children. On 17 February 2000, the appellant arrived home earlier than anticipated. The next morning an argument concerning their problems ensued during which the deceased sustained a fatal gunshot wound.

[3] The appellant was charged with her murder and pleaded not guilty. His legal representative tendered a plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the Act). Briefly, he stated that in an attempt to relieve her of possession of his firearm which she had taken from him, a struggle ensued during which a shot was discharged as a result of which the deceased died.

[4] The State called approximately nine witnesses. Having perused the record, it is in my view, not necessary to deal with their evidence extensively as it does not implicate the appellant and in the light of the approach adopted in this appeal.

[5] Ndulafe Matamela testified that she heard a female calling for help and screaming that she was dying. The call came from the appellant's home and she proceeded towards it. Before she got there she heard a gunshot. She then went to call the police.

[6] Kelvin Thambulani Maliga, the appellant's brother, testified that he had earlier visited the appellant and on his way back there later that morning, he overheard talk in the street about a shooting at the appellant's home. He went there and met the appellant who told him a gunshot had been discharged. Shortly after he left the appellant, he approached the police who asked him what had happened. He directed them to the appellant's home.

[7] The investigating officer, Sergeant Tshiwane, testified that on 18 February 2000, after receiving a report, he went to the appellant's home in the company of Sergeant Mudau. On their arrival, they met Kelvin Maliga outside. Kelvin allegedly reported to them that the appellant had said that he had shot the deceased. They then went to the appellant's home and Mudau asked him what had happened. He allegedly responded that he had shot his wife during an argument. The appellant was then arrested. Their search of the inside of the house produced a single

empty cartridge. The State also called Inspector Shabane Mudau. He confirmed most of what Sergeant Tshiwane had testified. He added that he thought that the appellant would escape and since he did not have handcuffs, he bound the appellant with wire and rope on arresting him and took him to the police station.

[8] Inspector Shadrack Freddy Masiwelele testified that a day or two after the appellant's arrest, he asked the appellant if he could take down a warning statement from him. He said that he had with him a set of the usual documents required for recording a warning statement. It contained certain formal questions to be asked of the deponent and provision for the responses thereto prior to dealing with the actual body of the proposed statement. Inspector Masiwelele testified that the appellant then willingly made a statement about how his wife had died. These formalities are designed to generally protect the rights of the deponent, including his or her constitutional rights in particular against self-incrimination. I will refer to these presently.

[9] Mr Poodhun who appeared for the State in the trial sought to have the statement admitted as evidence in the court below. The document, headed 'warning statement' was admitted provisionally as a warning statement and marked Exhibit 'D'. It is necessary however to refer to important aspects in exhibit 'D'.

[10] Firstly, one of the formal questions read together with the appellant's answer thereto is as follows:

'2.3 Question: You have the right to be assisted by a legal representative of your choice. Do you wish to exercise this right, and would you like to contact him? Who is this person?
Answer: To be represented by the lawyers from Law Clinic.'

It is clear from paragraph 2.3 of the statement that the appellant, after being alerted to his right to representation had elected to be represented by a 'lawyer from the law clinic'. This was in compliance with s 35 of the Constitution of the Republic of South Africa, 1996 (the Constitution). This request was ignored and Masiwelele proceeded to take down a confession whilst the appellant was unrepresented. This in itself would render the statement inadmissible.

Secondly, in the body of the statement, the appellant allegedly stated:

'When I came back home I enquired from her about the way in which the money was . . .

There was no sufficient the (sic) information received from her.
Since that she could not even respect me and that I could see that she was having an extra marital status with [another] man I then became aggressive and produced my personal firearm and shot her once on her person. I noticed that she was left in a pool of blood.'
This latter quote from the body of the statement is clearly an unambiguous admission of guilt to the charge and is therefore a confession as envisaged by s 217(1)*(a)* of the Act.

[11] The State then closed its case after which the appellant brought an application in terms of s 174 of the Act for his discharge. The application was dismissed on the basis of what was stated in the appellant's plea explanation; what he allegedly said to the policeman when he was arrested; on the evidence of Matamela to the effect that the deceased was saying that she was dying and that she thereafter heard a shot from the house and finally the contents of what Lukoto J referred to as a statement to which the appellant deposed to freely and voluntarily.

[12] The evidence of Tshiwane and Mudau that the appellant had shot his wife during an argument was illicited by them without warning him of his constitutional rights as envisaged in s 35 of the Constitution. It is therefore inadmissible. Also whatever Kelvin said to them regarding what the appellant might have said to him about the latter's alleged utterances is rendered inadmissible because Kelvin did not confirm that under oath. Furthermore s 217(1)*(a)* stipulates that a confession made to a peace officer other than to one referred to in s 334 (a commissioned officer), shall not be admissible, unless confirmed and reduced to writing in the presence of a magistrate or justice. His confession was not confirmed or reduced to writing in the presence of a magistrate or justice and is simply inadmissible on that ground alone.

[13] When the appeal was heard, counsel for the State was asked whether the court below was correct, given the quality of the evidence of the State to refuse the s 174 application. Specifically he was also asked whether the court below was correct in admitting into evidence the statements by the appellant to Masiwelele and to the policemen who arrested him.

[14] In response, Mr Poodhun who appeared in the appeal as well, conceded the following:

(i) The statement, though seemingly not considered in finding the appellant guilty, was in fact a confession and was clearly, on the face of it, inadmissible because it was made to a non-commissioned officer;

(ii) Whatever was said to the policemen by the appellant at the time of his arrest was also not admissible;

(iii) That in the circumstances, the appellant could possibly have been snared into testifying, and but for evidence in the statements, the State had not produced evidence to prove his guilt beyond reasonable doubt.

[15] The law regarding the admissibility of a confession seems to have escaped the trial judge and as a result an inadmissible confession and inadmissible statements made to the arresting officers were admitted into evidence. This failure to rule the aforementioned statements inadmissible constituted a serious irregularity and this leaves this court at large to deal with the matter as the court below should have.

[16] South African criminal law has traditionally incorporated the notions of fairness and justice though it was qualified from time to time. However since the advent of a democratic dispensation, the right to a fair and just trial has been enshrined in the Constitution – s 35(3) (and its predecessor). In *S v Zuma* 1995 (1) SACR 568 (CC), at para 16, Kentridge AJ (as he then was) said:

'The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras *(a)* to *(j)* of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire

> "whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted."

A Court of appeal, it was said (at 377)

> "does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration."

That was an authoritative statement of the law before 27 April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those "notions of basic fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.'[1] (See also *S v Khan* 1997 (2) SACR 611 (SCA).)

[17] In *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC) para 13, the following was stated:

'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial.'

[18] This court, in dealing with a similar situation In *S v Legote* 2001 (2) SACR 179 (SCA) held at 184d-i that the court, without compromising objectivity, has a duty to manage a criminal trial within the law governing criminal procedure. For example, the court has a duty to ensure that the accused is properly defended and that his or her constitutional rights are not negatively affected either by commission or omission. If at the end of the State's case, the State has not made out a prima facie case, in other words there is nothing for the accused to answer, the presiding officer must raise this question mero motu, especially in the absence of an application for discharge. It seems that this duty is not dependent on whether the accused is represented or not. See: *R v Hepworth* 1928 AD 265 at 277.

[19] Section 35(3) of the Constitution compels presiding officers and indeed all officers of the court to play a role during the course of a trial in order to achieve a fair and

[1]Section 25(3) was contained in the Interim Constitution of 1993. The equivalent section is now to be found in s 35 of the Constitution.

just outcome. As was said in *Hepworth* at 277 (supra) ‘a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed’. A judge’s role is to see that justice is done. Assuming that the learned judge in the court below had for some reason indeed been mistaken or neglected to rule these statements inadmissible, there are others who could and should have ‘reminded’ him of the dangers involved in admitting certain evidence. This is what was expected of both the prosecutor and the defence representative.

[20] It is unclear and indeed perplexing that the appellant’s representative did not object to the admission of the written statement and the other evidence which also amounted to inadmissible evidence. Even more important is the role of the prosecutor. A prosecutor stands in a special position in relation to the court. The paramount duty of a prosecutor is not to procure a conviction but to assist the court in ascertaining the truth. (*S v Jija* 1991 (2) SA 52 ECD at 67J-68A). Implicit herein is the prosecutor’s role in assisting a court to ascertain the truth and dispense with justice. This, not surprisingly, gels with the stringent ethical rules by which all legal representatives have to conduct themselves in their professional lives.

[21] In this case, the prosecutor was duty bound to alert the presiding officer of the possible dangers which were lurking in admitting the warning statement. The prosecutor who was the only person likely to know exactly what evidence he was about to place before court ought to have at least sought a ruling on the admissibility of the warning statement and the statement allegedly made by the appellant to the policemen who arrested him. The written statement, as he himself now concedes, is a confession. It could not have been admitted for lack of compliance with legal formalities. If the prosecutor was intent on having such evidence admitted, at the very least he should have requested a trial-within-a-trial in order to determine the admissibility of the warning statement. The same can be said about the evidence by the policemen who arrested the appellant. It must however be said that it is difficult to understand how anyone could mistake what is clearly a confession for a warning statement. The prosecutor failed in his duty. Had

the proper procedure in regard to the admissibility of these statements been followed, the scenario which the appellant faced would have been quite different as conceded. But for these inadmissible statements, there would be no case for the appellant to answer.

[22] Faced with this evidence, the appellant was clearly lured into testifying and consequently he did not receive a fair trial as enshrined by s 35 of the Constitution. Absent the inadmissible evidence he ought to have succeeded in his application for discharge after the State's case. The conviction therefore falls to be set aside. It follows that the sentence should also be set aside.

[23] The tragedy in this specific matter is that a person who ought to have been discharged after the State's case in 2002 is now free – some 12 years on. There was no explanation offered for this delay when the parties were asked about it. One can only imagine the disastrous effects on his life. It emphasises the need for the administration of justice, especially from the area over which the Venda High Court has jurisdiction, to be vastly improved as quickly as possible. This is not the first time that this court has found it necessary to comment on these problems and their effects on the lives of ordinary South Africans in that region.

[24] In the result, the following order is made:

1 The appeal is allowed and the conviction and sentence set aside.

2. The registrar of this court is directed to send a copy of this judgment to;

(a) The National Director of Public Prosecutions, Pretoria;

(b) The Director of Public Prosecutions, Thohoyandou; and

(c) Legal Aid South Africa, Thohoyandou.

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R PILLAY

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	Mr A L Thomu Instructed by: Legal Aid South Africa, Thohoyandou Legal Aid South Africa, Bloemfontein
FOR RESPONDENT:	Mr A I S Poodhun Instructed by: The National Director of Public Prosecutions, Thohoyandou The National Director of Public Prosecutions, Bloemfontein