

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 258/13

In the matters between:

LUCKY MASHUDU MAKHOKHA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Makhokha v The State* (258/13) [2013] ZASCA 171 (28 November 2013)

Coram: Brand, Lewis, Cachalia JJA

Heard: 26 November 2013

Delivered: 28 November 2013

Summary: A confession that does not meet the requirements of s 217 (1) of the Criminal Procedure Act 51 of 1977 is not admissible as evidence. Conviction on the strength of it is irregular and vitiates trial. Conviction set aside

.ORDER

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

The appeal is upheld. The convictions of the appellant are set aside.

JUDGMENT

Lewis JA (Brand and Cachalia JJA concurring):

[1] On 19 January 2005 the appellant was convicted by the Limpopo High Court (Thohoyandou) (Lukoto AJ) on one count of theft and one of robbery, and sentenced to imprisonment of six years and 15 years respectively, the sentences to run consecutively. That court (per Snyman AJ) refused the appellant's application for leave to appeal. Some four years later this court granted leave to appeal against both conviction and sentence. The appellant has been imprisoned for the past eight years.

[2] The sole basis for the conviction was a statement made by the appellant to an Inspector Ramovha. The statement was introduced by the State when Ramovha was giving evidence. He read it into the record. The appellant did not, during the course of the trial, contest the admissibility of the statement and no trial within a trial was held to determine the issue. The statement, argued the appellant on appeal, amounted to a confession. It was reduced to writing on the standard form headed 'Statement regarding interview with suspect'. In it the appellant confessed to stealing a vehicle and to robbing (hijacking) another. The only argument raised by the State on appeal was that the statement did not amount to a confession since the appellant did not admit to all the elements of the offences expressly in that he did not identify the vehicle stolen or that robbed sufficiently. But the State conceded that if that were the case then the trial court could not have convicted the appellant on the strength of the statement as an admission.

[3] The appellant, in the written statement, said that "The engine which was found at my home was of the Caravella which I steal from" And he described the robbery similarly, saying he intended to 'hijack' a Caravella or Microbus, and explained how he had gone about it with accomplices. The written statement thus quite clearly amounted to a confession in respect of both charges.

[4] The confession was not made to a peace officer (Ramovha was not a commissioned officer) and it did not comply with the other requirements of s 217 (1) of the Criminal Procedure Act 51 of 1977. Under that section a confession is admissible in evidence if made to a peace officer provided that it is confirmed and reduced to writing in the 'presence of a magistrate or justice'. The appellant's confession was made only to a police inspector who had no power to take it, and was not confirmed in the presence of either a magistrate or a justice. That in itself made it inadmissible.

[5] Moreover, the statement was not handed in as an exhibit by the State when Ramovha testified. And when the State cross-examined the appellant, the appellant's legal representative suggested to the court that the appellant should decide if he had any objection to the statement being handed in during the course of his evidence. The appellant said that he did not object. His lawyer said: 'Well, if he has no objection himself, then I shall not have any then.'

[6] The statement was irregular in various other respects. It is not necessary to deal with them. (The State explained that it was for this reason that it did not seek to admit the statement formally but introduced it through the evidence of Ramovha.)

[7] The appellant argued on appeal that the admission of the confession in this manner was so grossly unfair that it rendered the trial irregular. I agree. The trial judge should not have permitted the admission of the confession in this way or at all given that it did not meet the requirements of s 217(1) of the Act.

[8] In my view, the trial was vitiated by this gross irregularity and the convictions and sentences imposed must accordingly be set aside.

[9] The appeal is upheld. The convictions of the appellant are set aside.

C H LEWIS JUDGE OF APPEAL APPEARANCES:

For the Appellant: L M Manzini

Instructed by:

M C Mogashoa, Polokwane Justice Centre,

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For the Respondent: A I S Poodhun

Instructed by:

The Director of Public Prosecutions, Limpopo

The Director of Public Prosecutions, Bloemfontein