IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A215/2016

Date: 13/12/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

13/12/2016 .....
DATE SIGNATURE

In the matter between:

KLAAS DINGAAN MANYATHELA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

PRETORIUS J,

(1) The appellant was charged as accused 3 with murder, housebreaking

with the intention to rob and robbery, attempted murder, possession of an unlicensed firearm and possession of ammunition and convicted in the High Court, Pretoria on 17 August 2006 on all charges except the charge of possession of ammunition. He was legally represented throughout his trial. He was sentenced to life imprisonment on the charge of murder and a further 28 years' imprisonment on the other charges.

(2) This appeal is before us as a result of the appellant petitioning the Supreme Court of Appeal for leave to appeal as the court *a quo* refused to grant leave to appeal. Leave to appeal has only been granted against conviction.

BACKGROUND:

(3) On 13 November 2004 Mr and Mrs van Dyk was attacked on a farm in the Cullinan district in their house. During the incident Mr van Dyk was fatally stabbed with a knife and Mrs van Dyk suffered a gunshot wound to her lower body.

(4) A firearm belonging to Mr van Dyk was taken during the incident. Mrs van Dyk, who survived the attack, observed only one perpetrator and was unable to identify the person.

(5) Accused 1 and 2 were arrested the following day. The appellant was arrested precisely one year after the incident, allegedly on information provided by Monty Mokwena who, at some stage, shared a cell with the first accused. Accused 1 is the cousin of the appellant and he had made a report to Mr Mokwena.

(6) The appellant based his appeal on the fact that the trial judge had erred by admitting the statement, made by the appellant to a magistrate, as evidence and did not evaluate the evidential weight thereof. A further ground for the appeal is that the trial judge cross-examined the appellant on issues not raised in evidence-in-chief. According to the appellant the trial judge erred in rejecting the appellant's version.

(7) It is so that the appellant was arrested a year after the incident after a certain Monty Mokwena informed the investigating officer, Inspector Bester, of the appellant's involvement in the crimes. Monty Mokwena shared a cell with accused 1 at some stage, and accused 1 supplied him with certain information which lead him to inform Inspector Bester, the investigating officer. This information lead to the arrest of the appellant.

(8) Inspector Bester's evidence was that after he had arrested the appellant he had interviewed the appellant who confirmed that he was

present at the scene of the crime. The appellant indicated to Inspector Bester that he was willing to make a statement to a magistrate. A trial-within-a-trial was held in court to determine whether the statement made by the appellant to the magistrate is admissible as evidence, as the appellant averred that he had been assaulted during his arrest and that he was told what to tell the magistrate. This was the appellant's version in court.

(9) The appellant was taken to a doctor after his arrest and prior to making the statement to the magistrate. The doctor noted no injuries to the appellant. During the trial-within-a-trial the appellant exaggerated the extent of his assault and deviated from the version his counsel had put to the witnesses.

(10) It is important to refer to the form completed during his appearance in front of the magistrate, as well as the magistrate's evidence.

(11) According to the notes on the form, the magistrate asked the appellant: *"Have you been threatened, forced or encouraged by the police or anyone else to make this statement?"*, to which the appellant replied: *"No, but I was assaulted by the police yesterday when arrested. No visible injuries."* His reply to the following question whether he had been *"threatened with assault or action or any other prejudice whatsoever if you decline to make a statement to the magistrate?"* was

"No".

(12) He indicated that he had been assaulted by the police when he was arrested and when he was asked the reason for the assault his reply was: *"They said I must take out or give them the firearm."* He further indicated that he had no wounds or injuries. At the question whether he expected any benefits by making the statement, he replied: *"I am only prepared to tell the truth."* He informed the magistrate that nobody had told him what to say in the statement. His version to the magistrate is confirmed by the question Adv More, his counsel, put to the magistrate, confirming the reason he had given the magistrate for the assault. No further reasons for any assault to make a statement were provided to the magistrate.

(13) The appellant argues that the magistrate should have investigated the matter of the assault further. I disagree if the questions and answers which were supplied in front of the magistrate, as set out above, are taken into consideration.

(14) The court is aware that the admissions made to the magistrate are the only evidence against the appellant. As the statement made to the magistrate by the appellant is the only evidence against him, the court has to deal with it carefully.

(15) In **Chauke and Another v State**[1] the court held:

> *"The question whether a statement was freely or voluntarily made, is usually determined at a trial-within-a-trial. The admissibility of a statement has to be carefully and consciously considered and ruled upon, particularly where the statements in question are the only evidence upon which a conviction is sought to be premised. In this regard see S v Mkwanazi 1966 (1) SA 736 (A); S v Radebe 1968 (4) 410 (A) 414D-E; S v Zulu 1998 (1) SACR 7 (SCA) 13d-f and Commentary on the Criminal Procedure Act 24-57."*

(16) In **S v Zulu**[2] Grosskopf JA held:

> *"The first appellant's statement is the only evidence implicating him in the commission of these crimes. It was held in S v Mkwanazi (supra) at 745G - H that a 'confession in such a case is not necessarily "suspect" but the circumstances may be such as to call for a particularly careful assessment by the presiding Judge of the question of the freedom and voluntariness of the confession'."*

(17) The main submission by the appellant is that the facts set out in the

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[1] Chauke v The State (70/12) [2012] ZASCA 143 (28 September 2012) at paragraph 21
[2] 1998(1) SACR 7 at 13 d-e

magistrate's form do not correspond with the facts of the matter and are therefore not reliable. According to the appellant he and his two co-accused had entered the house through the door, although the facts show that the perpetrators had gained entry to the house through a broken window. It was accepted by the court *a quo* that the appellant had not been schooled and that the appellant was the source of the content of the statement. The court found the evidence to be reliable.

(18) It is so that where the incriminating statement contains a material untruth the court has to evaluate the evidence carefully.

(19) The learned judge dealt extensively with the trial-within-a-trial in his judgment. He dealt with Magistrate Mabunda's evidence and found that there was no indication whatsoever to the magistrate that the appellant had made the statement due to threats or being assaulted or that he had been told what to say. This was confirmed as the doctor, who had examined him before he was taken for the statement, found that there were no injuries. The version of the appellant put to Inspector Bester was that the appellant had been assaulted by being hit with an open hand and that a jacket was thrown over his head and cold water was poured over him. This in contrast to the appellant's evidence that he had been hit with an open hand, shocked and that a stick was placed between his hands and legs. No cogent explanation

was offered for this deviation and why he had not informed his counsel of this version. The further complaint that the court had cross-examined the appellant in an improper manner cannot be sustained. After careful scrutiny of the record, it is clear that he was clarifying certain issues.

(20) The learned judge had after considering all these facts come to the conclusion:

> *"Ek was tevrede dat die staatsgetuies die waarheid gepraat het en die beskuldigde se getuienis verwerp kon word op hierdie aspekte en om daardie rede het ek die bekentenis toe toegelaat."*

(21) It cannot be said that the learned judge had misdirected himself in this instance. I cannot find any reason to find that the finding of the court *a quo* should be interfered with. It is clear that the appellant was one of the perpetrators as found by the learned judge and that he was correctly convicted on the charges.

(22) In the result I make the following order:

The appeal is dismissed with costs.

Judge C Pretorius

I agree.

Judge R G Tolmay

I agree.

Judge N B Tuchten

Case number	: A215/2016
Matter heard on	: 2 December 2016
For the Appellant	: Adv F van As
Instructed by	: Pretoria Justice Centre
For the Respondent	: Adv M Jansen van Vuuren
Instructed by	: Director of Public Prosecutions