IN THE HIGH COURT OF SOUTH AFRICA, KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE No. AR 69/13

THABANI RAYMOND ZULU **Appellant**

Versus

THE STATE **Respondent**

JUDGMENT

VAN ZÿL, J.: (VAHED, J and NZIMANDE, AJ concurring)

1. On 21 June 2006 the late Mr Boy Joseph Masango, the Municipal Manager of Ulundi, KwaZulu-Natal was shot and killed in the driveway of his home in Mdabonkulu Street, Ulundi. The appellant appeared before Rowan A.J., sitting with two assessors, charged with the murder of the deceased. It was alleged in the indictment that the charge was subject to the provisions of section 51 and Schedule 2 of the Criminal Procedure Amendment Act 105 of 1997. The appellant was at all material times legally represented and entered a plea of not

guilty. He was, however, convicted as charged at the conclusion of his trial and sentenced to imprisonment for life.

2. At the commencement of the appeal proceedings before us we sought to clarify whether the appeal was intended to be one against conviction only, or whether the appeal was also against the sentence imposed by the trial court, in the event of the appeal against the conviction being unsuccessful. This enquiry was necessitated by the fact that the written application for leave to appeal, which was only delivered some three years later, sought leave in respect of both conviction, as well as sentence. However, the leave to appeal as granted to this court related only to conviction and was silent on the issue of sentence.

3. Whilst counsel's written argument on the appeal was restricted to the issues relevant to conviction, it was unclear whether this resulted merely from an adherence to the terms of the order granting leave, or because the appellant in fact did not intend persuing any appeal on sentence, irrespective of the outcome of the appeal on conviction. We accordingly posed this question to Mr Marimuthu, who appeared for the appellant in the appeal before us. He wisely asked for the appeal hearing to stand down in order to clarify the position with the appellant who was also present at court. Upon resumption of the proceedings counsel advised that in terms of his instructions no appeal would be pursued in respect of sentence, but that the appeal

was restricted to the issues arising in relation to the conviction only. The appellant duly confirmed his instructions to counsel and the appeal then proceeded accordingly.

4. In his written argument counsel for the appellant had at the outset suggested that the reference contained in the indictment to section 51 and Schedule 2 of Act 105 of 1997 was ambiguous, in that it did not inform the appellant with sufficient clarity whether the state intended the charge of murder to fall into the categories envisaged by Part 1 or Part II of the Schedule. Generally the necessity for informing an accused person in good time of the sentencing provisions to be relied upon by the state arises because "*a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which will bear on the outcome of the case as a whole, including sentence.*" (per Gorven J in *S v Langa* 2010 (2) SACR 289 (KZP) at page 304e).

5. In the present instance the warning as contained in the indictment was extended timeously, but the suggestion arising was that it was not sufficiently accurate to adequately serve its intended purpose. I am unpersuaded of the validity of such criticism. The *caveat* thus extended, although in general terms, suggested quite unequivocally that the state might, at the sentencing stage, contend for life imprisonment as contemplated in section 51(1) read with Part I of

Schedule 2 and in addition, the appellant was legally represented throughout the duration of his trial.

6. However, in addressing the court after clarifying the nature and extent of the appeal, counsel for the appellant did not refer to this issue, which accordingly was not debated before us. Since offences falling into the different categories contemplated in Parts I and II attract sentences of differing severity and in the light of the abandonment of any appeal against sentence, I find it unnecessary to say anything further in this regard.

7. The main thrust of the argument on behalf of the appellant relevant to conviction related to attacks firstly upon the admissibility of the statement made by the appellant to Capt. S. J Smith (exhibit "L") and secondly to the subsequent pointing out and accompanying statement made to Capt. B. F. Zondo (exhibit "M"). These attacks may conveniently be dealt with separately.

8. The first issue related to the alleged irregularity tainting the admissibility of the statement to Capt Smith. This arose from the interpretation of the communications between Capt. Smith and the appellant which resulted in the statement received as exhibit "L". The interpreter involved was the late Detective Warrant Officer J. M. Mbatha, at the time a member of the investigative unit.

9. The second attack was based upon the claim by the appellant that the statement to Capt Smith, as well as the subsequent pointing out to Capt Zondo, were not freely and voluntarily made and should consequently not have been admitted in evidence against him.

10. A third issue which was raised and developed in the course of the argument before us concerned the sufficiency of the evidence implicating the appellant, even if one or the other, or both, contested statements were held to have been correctly admitted in evidence by the trial court.

11. The appellant claimed that the late Detective Warrant Officer Mbatha had been an active, if not the leading participant in his interrogation and the assaults perpetrated upon him prior to the appellant making his statement to Capt Smith. The trial Court was alive to the difficulties arising and embarked upon a careful and comprehensive analysis of the evidence and evaluation of the witnesses before concluding that the state witnesses were reliable and rejecting the evidence of the appellant as unreliable.

12. It goes without saying that it is undesirable for an officer of the same unit as the investigative team to act as interpreter during the taking of a statement from an accused, particularly if the statement amounts to a confession. Indeed Capt Smith indicated that if he had realised at the time that Warrant Officer Mbatha was part of the investigative

unit then he would not have used him as interpreter. But it should be remembered that the trial court accepted the evidence of Warrant Officer Thabethe that the late Warrant Officer Mbatha had not been party to the interrogation of the appellant and had rejected the latter's claims that he was assaulted by Warrant Officer Mbatha.

13. Mr Du Toit, who appeared for the State in the appeal before us, relied upon *S v Nzama and Another* 2009 (2) SACR 326 (KZP) at paragraph 31. In the light thereof counsel submitted that Warrant Officer Mbatha's membership of the unit was not fatal to the admission of the statement and that it could nevertheless be received in evidence as having been freely and voluntarily made. In the light of the trial court's factual findings I am of the view that the late Warrant Officer Mbatha's membership of the investigative unit did not *per se* justify the rejection of the statement made by the Appellant to Capt Smith.

14. In arriving at a conclusion as to whether the state has discharged the duty of proving that the statement to Capt Smith and the pointing out and accompanying statement to Capt Zondo were freely and voluntarily made without undue influence, a court needs to consider all the evidence placed before it. In my view the trial count did that and critically weighed the individual elements of the available evidential material.

15. Both Capt Smith as well as Capt Zondo favourably impressed the trial court. It also found persuasive detail in the statements attributed by each of these witnesses to the appellant. On both occasions and before different officers, they recorded that the appellant's stated motivation for admitting his involvement in the murder of the deceased was his heartfelt remorse for what he had done. At the pointing out before Capt Zondo the witness also recorded his observation of actual tears of emotion shed by the appellant at the time of professing his remorse.

16. At the conclusion of the trial within a trial the court below ruled the statement by the appellant to Capt Smith, as well as his pointing out and accompanying statement to Capt Zondo admissible in evidence. I cannot fault such ruling in all the circumstances of this case.

17. A court of appeal is not at liberty to interfere with the factual findings of the trial court in the absence of material misdirections or irregularities. In such circumstances the findings of the trial court are presumed correct unless the recorded evidence demonstrates the contrary. (*S v Monyane* 2008 (1) SACR 543 (SCA), Ponnan, JA at para 15). It is also well recognised that the trial court enjoys advantages in the evaluation of the testimony presented before it which a court of appeal cannot experience.

18. In the present matter the trial judge produced a careful well-reasoned and insightful analysis of the evidence as summarised in the judgment of the court. Consideration was given to any weaknesses in the evidence of the different witnesses called by the State. Such evidence was evaluated against the background of the evidence as a whole. Following a comprehensive review of the evidence, the trial court effectively arrived at the conclusion that the evidence against the appellant was sufficiently compelling and the evidence of the appellant so unpersuasive that a conviction of murder was justified. Such conclusion is also consistent with the provisions of section 209 of the Criminal Procedure Act 51 of 1977 with regard to the conviction of an offender based upon his own confession.

19. In the final analysis I am of the view that there are no grounds upon which this court may legitimately interfere with the conviction of the appellant. On the contrary, I consider that the guilt of the appellant was properly established beyond any reasonable doubt. It follows that the appeal against conviction cannot succeed.

20. I accordingly propose that the appeal against the conviction of the appellant of murder be dismissed.

_____

VAN ZYL, J.

_____

VAHED, J.

_____

NZIMANDE, A.J.

CASE INFORMATION

Appellant's Counsel:	**Adv P Marimuthu**
	Instructed by the Justice Centre
	Pietermaritzburg
Respondent's Counsel:	**Adv J du Toit**
	Instructed by the DPP, (KZN)
	Pietermaritzburg
Date of Hearing:	**27 January 2014**
Date of Judgment:	**19 June 2019**