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

NOT REPORTABLE
CASE NO: AR194/15

In the matter between:

SBONGISENI "WALA" NYATHIKAZI APPELLANT

And

THE STATE RESPONDENT

Coram : Seegobin, Poyo Dlwati J et Hemraj AJ
Heard : 27 May 2016
Delivered : 28 June 2016

ORDER

On appeal from the KwaZulu-Natal Division of the High Court, Durban (Balton J, sitting as a court of first instance):

The appeal is upheld and the convictions and sentences are set aside.

JUDGMENT

SEEGOBIN J (Poyo Dlwati J et Hemraj AJ concurring):

[1] The appellant was indicted before Balton J and assessors sitting in the High Court, Durban, on one count of murder and three counts of rape. On 28 February 2008 the appellant was convicted as charged. On the murder count he was sentenced to life imprisonment and on each of the rape counts he was sentenced to 20 years imprisonment.

[2] The appellant's application for leave to appeal against both conviction and sentence was refused by the court *a quo*. The appellant was granted such leave by the Supreme Court of Appeal on 31 March 2014 and it is on that basis that he is before us on appeal.

[3] The gist of the State's case was that on the evening of 6 January 2007 the appellant visited the deceased at the deceased's place of residence. The deceased subsequently left her place of residence in the company of the appellant. The appellant and the deceased were later joined by three companions. They then proceeded to a nearby bush to smoke dagga. After they had smoked dagga the appellant and his three companions (collectively referred to as the assailants) each decided to rape the deceased once. The

deceased died on the scene, the cause of death was 'undetermined'. The assailants then fled the scene. The State further alleged that notwithstanding the fact that the assailants each raped the deceased once only, the appellant was guilty of three counts of rape by virtue of the following:

- The appellant was guilty of one count of rape as a perpetrator in that he had sexual intercourse with the deceased once.
- He was guilty of the remaining two counts of rape in that he facilitated the rape of the deceased by the other assailants by remaining in the vicinity, keeping watch and preventing resistance or escape by the deceased.
- He and his companions acted in furtherance of a common purpose to commit the crimes alleged in the indictment.

[4] The State case rested on the evidence, *firstly*, of several witnesses who last saw the deceased alive on the 6 January 2007, and *secondly* on the evidence of a pointing out and statement made by the appellant to a police captain after his arrest. As far as the latter evidence is concerned the trial court found that the appellant had failed to discharge the *onus* on him of showing that the statement made by him during the pointing out was not made freely and voluntarily and when he was in his sound and sober senses. It is this aspect of the evidence that formed the subject matter of the appeal and against which a detailed and wide ranging attack was levelled by *Mr Mngadi* on behalf of the appellant. It was contended, *inter alia*, that there was no objective evidence to prove that the appellant was properly warned of his constitutional rights from the time of his arrest until he was placed in the hands of *Captain Chetty* who conducted the pointing out. Nor was there any evidence to show that at the time of his interrogation and/or before the pointing out, the appellant was advised that he could elect to make a

statement before a magistrate. There was also no evidence to show that the appellant was advised that he had a right not to incriminate himself. It was further contended that the appellant was not taken to a doctor before and after the pointing out in order to rule out any allegations of assault against the police. *Lastly*, and perhaps importantly, it was contended that the court *a quo* had misconstrued the incidence of the burden of proof in a trial-within-a-trial. From what appears hereunder I consider that the arguments raised by Mr Mngadi are not without merit.

[5] I start with the circumstantial evidence first. Inspector Cele from the Hillcrest Police Station attended the scene on 9 January 2007, where the decomposed body of the deceased was found. Her dress had been lifted to her chest, and next to her body were items of underwear and a pair of cycling pants. A blue cap was found some distance from the body. He was present when photographs of the scene were taken.

[6] The deceased's boyfriend, *Mr M*, testified that he and the deceased had been lovers for three years. He knew the appellant from the area. On 6 January 2007 he was seated in the yard of the N homestead when he saw the deceased walking past on the footpath with three other women. He also saw the appellant walk past in the company of other people. He was shown a photograph of the scene depicting a blue cap and he said it was the appellant's cap that he was wearing on that day. Under cross-examination, he said that the appellant fetched the deceased from the N homestead and left with her at about 19h15. When the appellant arrived, he was talking to the deceased calling her "mother", "aunt" and "sister". He was sitting on the same bench as the deceased and did not show her any respect because he was touching her and hugging her.

[7] Mr M testified that he went to the deceased's sister and complained that he did not like what was happening. He said he conveyed his objections to the appellant who replied "you won't do anything to me". He further testified that he did not see any writing on the blue cap that was being worn by the appellant. He was some five metres away and it was dark. He was adamant that the blue cap at the scene, as depicted in the photograph, was the same as that worn by the appellant.

[8] He said he could not stop the deceased from going with the appellant or do anything because he was ill with tuberculosis. The deceased, he said, was not protesting when she left with the appellant. She was drunk and she was singing. When he realised she had not returned he enlisted the help of others to look for her.

[9] *Ms N*, the sister of the deceased, testified that she lived in close proximity to the deceased. She saw the appellant arrive at the homestead from the same feast that her sister had been attending. When the witness went to bed she heard a child crying and when she went outside, she saw the deceased and the appellant walking on the road with the deceased's child following them, crying. She caught up with them and said to the deceased that they should go home. She grabbed the deceased by her arm, but the deceased broke away. She left the deceased standing with the appellant on the road. She said the appellant was wearing a blue cap which was the same as that depicted on a photograph of the scene. Under cross-examination she said it was dark when she caught up with them and could not see them clearly. She was about two meters away from them. She had seen the blue cap being worn by the appellant during the day.

[10] A trial-within-a-trial was held to determine the admissibility of a pointing out made by the appellant to Captain Chetty of the South African Police Services. The court found that the appellant had been unable to discharge the *onus* on him showing that the statement and the pointing out were not freely and voluntarily made by the appellant when he was in his sound and sober senses. The statement was admitted into evidence and the evidence led at the trial within a trial was incorporated into the main trial.

[11] *Doctor Pillay* testified that he conducted the post-mortem examination on the body of the deceased. He was unable to determine the cause of death because of the advanced decomposed state of the body. He recorded deep scalp bruising over the occiput, which is the back of the head as well as ante mortem bruising over the right supraorbital ridge and maxilla. There were also abrasions on the left arm and forearm, but these would not have contributed to death. He said the main problems were the injuries to the head.

[12] The appellant testified that on 6 January 2007, he attended a feast at his parental home. He arrived with other persons at about 10h00. He together with his family drank traditional beer and sang. At the feast there was an argument about the soccer match and he left with the same people he had arrived with at about 17h00 and went home. Towards the afternoon, he was watching a soccer match on television with his girlfriend. He denied going to the deceased's home.

[13] When the appellant was cross-examined, he said he could not dispute that the deceased was at the feast but he had not known her. He was cross-examined about his statement at the pointing out that he had called "Sissy" to smoke dagga with them. He said that did not refer to the deceased. He

thought the interpreter had mentioned his sister. He said he only heard about the deceased's death when he was arrested some three months after the incident. He did not possess a cap. He maintained that he was forced to do a pointing out. The court *a quo* dealt with the reasons for the finding made at the conclusion of the trial-within-a-trial in the main judgment. The court found that the *onus* was on the appellant to show on a balance of probabilities that he had been assaulted to do the pointing out and that he had failed to discharge the *onus*.

[14] The learned Judge, having admitted the statement, relied on its contents to find that the appellant was part of a group who acted in furtherance of a common purpose to rape and kill the deceased. She found that the group unlawfully and intentionally caused the death of the deceased, either by grabbing her tightly at the neck or strangling her during the rape. The learned Judge again, relying on the contents of the statement, further found that the appellant and two others had intercourse with the deceased. The court also relied on the contents of the statement that "Sissy" died after they had sexual intercourse with her.

[15] The issue of the *onus* as stated by the court *a quo* with regard to the trial-within-a-trial amounts to a misdirection in the light of the decision of the Constitutional Court in *S v Zuma & Others* 1995(1) SACR 568.

[16] As I pointed out already the litany of complaints with regard to the lack of evidence of any constitutional rights being explained to the appellant is not without merit. Indeed, such evidence is markedly absent in the case presented by the State. *Ms Watt*, who appeared for the respondent, was constrained to agree that the State failed to place any of this evidence before the court *a quo*.

[17] In *S v Magwaza* 2016(1) SACR 53 (SCA), the court referred to the observations by Froneman J in *S v Melani and Others* 1996(1) SACR 335 (E):

> "the right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions….these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination."

[18] Ponnan JA in *State v Magwaza supra* made the following comments:

> "[17] It is clear that the rights in question exist from the inception of the criminal process, that is, from arrest, until its culmination (up to and during the trial itself)……
>
> It is important to appreciate that a constitutional right is not to be regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making a suspect aware of his rights is so that he may make a decision whether to exercise them, and plainly he cannot do that if he does not understand what those rights are (*R v Cullen* (1993) 1 LRC 610(NZCA) at 613 G-I).
>
> It must therefore follow that the failure to properly inform a detainee of his constitutional rights renders them illusory…..
>
> [18] If it is accepted, as I think it must be, that the appellant was not properly warned of his constitutional rights, then it must follow that there was a high degree of prejudice to him because of the close causal connection between the violation and the conscriptive evidence. For, plainly, the rights infringement resulted in the creation of evidence which otherwise would not have existed."

[19] The State was represented during the trial by a senior state advocate. It was incumbent upon him to place the evidence pertaining to the constitutional warnings before the court. He led no such evidence. More seriously, he misstated to the court that the onus in the trial within a trial, was upon the accused, and indeed conducted the entire matter on that incorrect premise. It is inconceivable that he was unaware of the judgment of the Constitutional Court in *S v Zuma* 1995(2) SA 642 (SCA) which clearly states that the *onus* is on the state to be discharged on proof beyond reasonable doubt.

[20] In terms of the Code of Conduct for members of the National Prosecuting Authority published in Government Gazette No.33907 on 29 December 2010, prosecutors must inter alia;

> "A ….
>
> > (f) Strive to be well-informed and to keep abreast of relevant legal developments; ……..
>
> C …….
>
> > (i) Assist the court to arrive at a just verdict and, in the event of a conviction, an appropriate sentence based on the evidence presented.
>
> D …..2
>
> > (h) Examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
> > (i) refuse to use evidence which is reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the accused person's human rights and particularly methods which constitute torture or cruel treatment."

[21] Regrettably, the state failed to adhere to this code of conduct in the present matter.

[22] Returning to the convictions, with regard to the conviction for murder, the learned Judge found that death occurred because of strangulation at some stage during the rapes. This is based on the statement made by the appellant that one of the persons in the group "grabbed the deceased around her neck and held tightly". There is no medical evidence to support this finding. On the contrary, Dr Pillay records no injury to the neck structures in the post mortem report, Exhibit "D". The cause of the injuries to the head of the deceased cannot be attributed to any particular cause. To find that they were sustained during the rape or at any stage thereafter would be to enter the realms of speculation.

[23] The only reliable evidence is that the deceased was seen leaving with the appellant whilst in a drunken state, singing and resisting her sister's efforts to bring her back home. Her body was found three days later approximately 150 metres away from her home. The only nexus to the appellant thereafter is to be found in his statement made during the pointing out. Absent that, there are huge lacunae in the state's case which cannot be cured by conjecture. To draw any inferences would have one take quantum leaps in logic which are not warranted on the evidence.

[24] The convictions are based solely on the contents of the statement made by the appellant during the pointing out. The following comments of Ponnan JA in *Magwaza*, *supra*, are apposite here:

> "[21] Both the trial court and the full court focused solely on the voluntariness of the appellant's conduct. Neither touched, even tangentially, on the Constitution's

exclusionary provision – section 35(5) – nor appeared to appreciate, as Van der Merwe & Schwikkard Principles of Evidence 3 ed para 12.9.7 points out:

> 'If an accused was not prior to custodial police questioning informed by the police of his constitutional right to silence, the court might in the exercise of its discretion conclude that even though the accused had responded voluntarily, all admissions made by the accused to the police should be excluded in order to secure a fair trial.
>
> The exercise of the relevant discretion leads to the conclusion, in my view, that those factors which justify exclusion materially outweigh those which call for admission.'"

[25] It is so that the appellant was a most unsatisfactory witness during the trial within a trial and seemed to have difficulty maintaining a coherent version about the assaults upon him. Notwithstanding, the constitutional imperatives must lead me to conclude that the evidence of the pointing out and statement ought to have been excluded. That being so, there is no evidence whatsoever against the appellant. It follows that the convictions are unsafe and must be set aside.

ORDER

[26] The order I make is the following:

The appeal is upheld and the convictions and sentence are set aside.

_____

_____ I agree _____

POYO DLWATI J HEMRAJ AJ

Date of Hearing	:	27 May 2016
Date of Judgment	:	28 June 2016
Counsel for Appellant	:	SB Mngadi
Instructed by	:	The Director of Public Prosecutions Pietermaritzburg
Counsel for Respondent	:	Ms K Essack
Instructed by	:	Justice Centre, Durban