THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 70/12
Not reportable

In the matter between:

CHAUKE HLAYISANI RONNY **FIRST APPELLANT**

NHLEKO LUNGELO JACKSON **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Hlayisani Chauke v The State* (70/12) [2012] ZASCA 143 (28 September 2012).

Coram: **Navsa, Malan, Bosielo, Tshiqi and Petse JJA**
Heard: **17 September 2012**
Delivered: **28 September 2012**

Summary: Criminal law – murder – liability – no admissible evidence placing accused at the scene of crime – no basis upon which accused could be convicted. Extra-curial statement – admissibility – when contested – must be established by trial-within-a-trial.

ORDER

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

The appeal of both appellants is upheld and their convictions and the sentences are set aside.

JUDGMENT

PETSE JA (Navsa, Malan, Bosielo and Tshiqi JJA concurring):

[1] The appellants were indicted before Hetisani J in the Limpopo High Court, Thohoyandou on a charge of murder of a taxi-owner, Mr Mihloti Foster Mukhari. They were both convicted as charged and subsequently sentenced to 27 years' imprisonment.

[2] On 28 November 2006, Hetisani J refused the appellants leave to appeal which was subsequently granted by this court on 22 July 2008 both against the convictions and the related sentences.

[3] Before considering the merits of this appeal it is necessary to say something about some disturbing features of the case. First, it took almost five and a half years for the appellants to have their application for leave to appeal heard. This was in no way attributable to any fault on their part.

[4] It appears from the record that the appellants endeavoured, initially without legal assistance, to seek leave to appeal their convictions and sentences as early as 10 August 2001. Pursuant to letters written by the appellants to the Registrar of the High Court, the latter referred the matter to an attorney, who had represented them at the trial, with a request that he prosecute their applications for leave to appeal.

[5] In 2003, disgruntled at the lack of progress, the appellants solicited the assistance of the Inspecting Judge of Prisons who advised them that their complaint fell outside of the mandate of his office. The appellants then resorted to communicating with the Minister of Justice, whose administrative officer acknowledged receipt of the letter on behalf of the minister and further indicated that the matter had been referred to the Registrar of the High Court for urgent attention. There was no response from the registrar. The absence of a response by the registrar prompted a reminder on 10 February 2004 in which the registrar was again urged to report to the appellants on the current status of their appeal. This prompted the registrar to write to the second appellant on 22 April 2004 reporting that a response was still awaited from their erstwhile attorney.

[6] Nothing resulted from this correspondence. During 2005 letters went back and forth between the appellants, the registrar and the minister's office. Meanwhile, a new Minister of Justice took office and she too took up the appellants' cause with the registrar. Ultimately some headway was made when, on 28 November 2006, the appellants' application for leave to appeal was heard and refused by Hetisani J.

[7] Following the refusal of the application for leave to appeal in the high court, the appellants approached this court for such leave which, as already mentioned in para 2 above, was granted on 22 July 2008. Once leave to appeal had been granted, further delays in prosecuting the appeal occurred. It took a little more than four and a half years before this appeal was heard. When the record of appeal was eventually filed with this court it incorporated material which was entirely unnecessary and in breach of the rules of this court governing the preparation of records. In the result a period of some eleven years, a greater part of which the appellants have been incarcerated, has elapsed since the appellants' conviction. Thankfully, they had in the interim been released on bail.

[8] In general terms, an appellant ought rightly to take the necessary steps to ensure a full and complete record is lodged within the prescribed time-limits, to enable a proper appeal hearing. However, the circumstances of this case and the inexcusable lapse of time cannot be ignored. The appellants struggled for years to obtain a date for their application for leave to appeal to be heard in the high court.

For years, they struggled to engage the necessary institutions for assistance, including the minister and the Prosecuting Authority. In these circumstances the State ought to have been of assistance, particularly since they were unrepresented for a lengthy period whilst they sought assistance in the prosecution of their appeal.

[9] It goes without saying that the inordinate delays experienced in this matter are entirely unacceptable for obvious reasons. In terms of s 35(3)(o) of the Constitution, the appellants have a right to a fair trial which included the right of appeal or review to a higher court. Moreover, s 34 of the Constitution accords to everyone the right of access to a court. Accordingly the delays of the extraordinary duration experienced in this case clearly undermine or compromise such rights in circumstances where there can be no justification therefor in an open and democratic society.

[10] I now turn to the merits of the appeal. The prosecution of the appellants arose out of an incident which occurred on 1 November 2000 at Mukondeni, Limpopo. It was alleged that the appellants, acting in the furtherance of a common purpose, intentionally and unlawfully shot and killed the deceased. The State called several witnesses to support its case against the appellants. The State's case, accepted by the high court, is summarised in this and the following paragraphs. The principal State witness, Inspector Frederick Nesengani, a member of the South African Police Service, attached to the organised crime unit had, pursuant to a report that he had received on 20 November 2000, travelled to Elim Hospital where he found the deceased at the outpatient department at 20h00. The deceased informed him that he had been shot by two unknown young men who had robbed him of his motor vehicle.

[11] According to Nesengani he interviewed the first appellant on 10 January 2001 who, having been informed of his constitutional rights, told him that:
(a) he (the first appellant) and his accomplice (the second appellant) had robbed the deceased of his motor vehicle;
(b) his accomplice then shot the deceased;
(c) when they could not start the vehicle they abandoned it and fled the scene;
(d) the first appellant communicated all of this freely and voluntarily, saying that he was not the one who had shot the deceased.

[12] Ms Grace Chauke, the first appellant's stepmother, also testified. The gist of her evidence was that the first appellant arrived at his father's home in Limpopo during November 2000 accompanied by the second appellant. Soon after they arrived she left. She saw the first appellant again on 11 January 2001 when he was brought to her home escorted by seven police officers. The first appellant told her that he 'is said to have killed someone'. All of this time, the first appellant was in handcuffs and 'was crying'. She denied that there was bad blood between her and the first appellant.

[13] Ms Agnes Matzivhandile also testified. Her evidence was that at approximately 19h30 on 30 October 2000 she met two men unknown to her, at the crossroad leading to Mashamba. They enquired of her if taxis to Mashamba were available and she told them that they were 'very scarce'. Whilst waiting for transport the two men told her that they were from Soshanguve. They then moved away from her and walked across the road. Later, a Venture motor vehicle appeared and when she could no longer see them she assumed that they had boarded the Venture. She could not identify the two men.

[14] Mr Ronnie Tshiphiwa Mokola, the deceased's neighbour, testified that early during the evening of 1 November 2000, the deceased, who was travelling to Mukondeni, offered a lift to two young men. When the deceased reached Mukondeni, the two young men requested him to convey them to their destination. Hence he decided to alight from the deceased's motor vehicle and to walk to his home. As he was walking away he heard the sound of a gunshot. He returned to where he had parted with the deceased and on his way, saw two young men standing at a distance. Fearing for his life, he dithered, and by the time he arrived at the crime scene, the deceased had already been removed. He too could not identify the two men who were with the deceased when he parted ways with the latter.

[15] The appellants testified in their own defence. It should be stated that, at least in respect of the first appellant, at the outset when he was asked to plead, he informed the high court through his legal representative that he had been assaulted by the police. His attorney supplied particulars of the alleged assault as well as

providing at least one location at which it was alleged he had been assaulted. Thus the court was put on its guard early on that in respect of any communication between the first appellant and the police the very basis of the communication being made freely and voluntarily was being challenged. It is unnecessary to analyse their evidence in any great detail. In essence they denied responsibility for the murder of the deceased. They both said that they were at Soshanguve on 1 November 2000. In particular the first appellant denied that when he was taken to his home by the police he ever admitted to Grace Chauke that he had murdered the deceased in collaboration with the second appellant. He further testified that he was subjected to sustained assaults at the hands of the police orchestrated by Nesengani and that an attempt was made to extract a confession from him. He added that when he was taken to a magistrate in Waterval for that purpose he refused to make a statement and instead informed the magistrate that he had been assaulted by the police. Hence the magistrate declined to take a statement from him.

[16] Despite their denials, the appellants were nonetheless convicted as charged. In summing the case against the appellants the high court said the following:

'It is commonly known in our criminal law in South Africa that the court can convict an accused, solely based on an inference which the court can have made from the evidence before it. In this case the court feels that there is no any other inference that can be made other than the fact that the two accused have indeed committed the crime they are facing. This is possibly so because the court has no difficulty in rejecting their defence that on 1 November they were not around in and around Whayene, which rejection is based on the evidence of Agnes Matzivhandile, as well as the testimony of Ronnie Makola and Thomas Thangwane.'

More will be said about this passage later.

[17] There was no analysis or debate about whether the alleged statements to the police and to Grace Chauke were confessions or admissions. What is clear is that the court below failed to take into account what it was informed about at the outset, namely, that the alleged statement to Nesengani was contested on the basis that it had not been made freely or voluntarily and that the statement allegedly made in the presence of Grace Chauke, with the police in attendance, was denied.

[18] Section 217(1) and s 219A respectively govern the admissibility of confessions and admissions by accused persons. The relevant part of s 217(1) reads as follows:

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.'

It is, for present purposes, unnecessary to deal with the proviso that a confession made under certain circumstances shall not be admissible unless reduced to writing before a magistrate. Section 219A provides the following:

'(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence.'

Similarly, for present purposes, it is unnecessary to deal with the proviso to this section.

[19] The following is stated by Du Toit *et al* in *Commentary of the Criminal Procedure Act* at 24-55:

'It is clear, now, that there are two separate yet, potentially, related inquiries that have to be carried out in determining the admissibility of a confession or admission; first, whether the requirements of, respectively, ss 217 and 219A have been satisfied, and, secondly, whether in all the circumstances, the accused has had a fair trial . . .'

[20] In *S v Lebone* 1965 (2) SA 837 (A) 844 this court expressed the view that the requirements of 'freely and voluntarily' and 'without undue influence', in relation to s 217 were distinct, each of which had to be complied with as a prerequisite to admissibility.

[21] 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.

[22] The statement allegedly made to Nesengani, is arguably a confession, at least to robbery. The statement testified to by Grace Chauke is arguably a confession to murder. I shall deal with it in context in due course. Hetisani J, notwithstanding that he had been put on his guard earlier on, paid no attention to the nature of the statement nor did he consider that he ought to have paid special attention to its admissibility, whether as an admission or a confession. Before us the State was constrained to concede that this omission was fatal to its case. The court below was content to allow evidence to be led on statements in the most unstructured manner, the admissibility of which was challenged at the most fundamental level, namely, whether the statement to Nesengani had been made freely and voluntarily, and the same applied to the statement to Grace Chauke, with the added factor as to whether it was made at all.

[23] Not only did the court below falter in permitting evidence on the contested statements to be led haphazardly, and without making a ruling upfront, concerning its admissibility, it compounded that error by rejecting, without proper consideration, the appellant's version of events and not considering at all the dangers attendant upon accepting unreservedly the evidence of Nesengani and Grace Chauke. Grace Chauke was a single witness whose testimony was not satisfactory in all material respects and on which no reliance could be placed (see eg *S v Sauls* 1981 (3) SA 172 (A) at 180). Secondly, the circumstances in which the alleged statement was made to her were not fully explored. It was, for example, not explained how it came about that the first appellant was taken to her. Nor was it explained why the first appellant was tearful when he made the alleged statement. Thirdly, the suggestion by the first appellant that Grace Chauke was falsely implicating him because there was bad blood between them, was simply not explored nor adverted to by the high court in its evaluation of the evidence.

[24] There is nothing inherently improbable about the first appellant's version of events, nor can it be said that the first appellant's version of how he was assaulted lacks credibility and that Nesengani's version of events is to be preferred above his.

Insofar as the second appellant is concerned, there is no direct evidence or sustainable circumstantial evidence on which his guilt could be based.

[25] In my view, counsel on behalf of the State reluctantly, but correctly, accepted that the convictions and related sentences ought to be set aside.

[26] Before concluding, there is one issue to address. As I have already mentioned, at the hearing of this appeal counsel for the State was constrained to concede at the outset that the convictions of the appellants were unsupportable. This was despite the fact that counsel, in his heads of argument, had adopted the stance that the convictions were unassailable. What I wish to highlight here is the need to underscore the dictum of Erasmus J in *S v Jija & others* 1991 (2) SA 52 (E)[1] at 68 where the following is stated:

'A prosecutor, however, stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth.'

Accordingly, it goes without saying that when it is manifest that a conviction cannot be sustained on appeal it is expected of counsel for the State not to defend what is by all accounts indefensible.

[27] In the result the following order is made:

The appeal of both appellants is upheld and their convictions and the sentences are set aside.

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X M PETSE

JUDGE OF APPEAL

1 Also reported in [1991] All SA 188 (E) at 203.

Appearances:

Appellants:	A L Thomu
	Instructed by:
	Justice Centre, Thohoyandou
	Justice Centre, Bloemfontein
Respondent:	A I S Poodhun
	Instructed by:
	Director of Public Prosecutions, Thohoyandou
	Director of Public Prosecutions, Bloemfontein