THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1198/2019

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS: GAUTENG DIVISION, PRETORIA **APPLICANT**

and

TOKOLOGO MBONANI **RESPONDENT**

Neutral citation: *The Director of Public Prosecutions: Gauteng Division, Pretoria* v *Mbonani* (1198/2019) [2020] ZASCA 115 (30 September 2020)

Coram: CACHALIA and ZONDI JJA and MATOJANE AJA

Heard: 19 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date for hand-down is deemed to be on 30 September 2020.

Summary: Criminal law and procedure – Application for leave to appeal against refusal by trial to reserve questions of law - application referred for oral argument – whether the trial court correctly dismissed the applicant's application for the

reservation of questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977. Whether points of law properly reserved

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ORDER

On appeal from Gauteng Local Division, Pretoria (Phahlane AJ) sitting as a court of first instance):

(i) The application for leave to appeal is upheld in respect of the application for reservation of questions 1 and 2.

(ii) The application for leave to appeal is dismissed in respect of the application reservation of questions 3 and 4.

(iii) The application for leave to appeal against the acquittal of the respondent on the murder and theft counts is granted;

(iv) The appeal against the acquittal of the respondent on the counts of murder (planned or premeditated), rape and robbery is dismissed;

(v) The appeal against the acquittal of the respondent on the alternative counts of murder (without planning or premeditation) and theft is upheld;

(vi) The order of the Court a quo is set aside and substituted by the following:

" (a) The application by the state to reserve questions 1 and 2 as questions of law is granted.'

(b) The application by the state to reserve questions 3 and 4 as questions of law is refused.

(c) The accused is acquitted on the main counts of murder (with planning or premeditation) robbery and rape.

(d) The accused is found guilty of murder and theft."

(e) The matter is referred back to the trial court to consider an appropriate sentence

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JUDGMENT

Matojane AJA (Cachalia and Zondi JJA concurring)

[1] This is an application terms of s 319 read with s 317(5) of the Criminal Procedure Act 51 of 1977 ("the Act") for leave to appeal against the refusal by the Gauteng Division of the High Court, Pretoria (the high court) (Phahlane AJ) to reserve four questions of law in favour of the applicant.

[2] The respondent, Mr Tokologo Mbonani, was arraigned in the high Court on four counts. The first, count 1, was a charge of kidnapping. The second, count 2, was a charge of murder read with the provisions of s 51(1) of Act 105 of 1997. The third, count 3, was a charge of robbery with aggravating circumstances read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. The fourth, count 4, was a charge of rape read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997.

[3] The indictment alleged that on 20 March 2017, the respondent falsely informed a lady friend of his that he knows about a possible job opportunity for a lady at the place where he was working. The lady friend then contacted the deceased, a relative of hers who was interested in finding a job. The deceased then went to the place where the respondent and a relative were present. The respondent and the deceased then left supposedly for the respondent's workplace. The deceased disappeared and was nowhere to be found.

[4] On 23 March 2017, family members of the deceased went to the house of the respondent. They found the deceased's cellular phone in his home. The respondent was arrested and detained. On 28 March 2017, the respondent pointed out the body of the deceased in a secluded place in the Brakpan area to the police. She was naked, and parts of her body were burnt. The cause of death was determined to be carbon monoxide inhalation.

[5] The charges were put to the respondent on 6 March 2018. He tendered a plea of not guilty to kidnapping (count 1) and rape (count 4) and a plea of guilty to murder (count 2). Concerning the charge of robbery (count 3), the respondent pleaded guilty to theft as a competent verdict. A written plea statement in terms of s112(2) of the Act signed by the respondent and his legal representative was read into the record.

[6] The state indicated to the Court that the facts tendered were not acceptable to the state. The state submitted that the murder was planned or premeditated, which would bring the murder charge within the ambit of s 51(1) of the Criminal Law Amendment Act 105 of 1997 and for which a sentence of life imprisonment was applicable. The state also said that it was not prepared to accept the plea on the competent verdict on the robbery charge.

[7] A plea of not guilty was subsequently entered in terms of s113 of the Act in respect of counts 2 and 3 as well. The respondent was not asked whether he was prepared to allow anything said by him during the plea explanation process to stand as an admission in terms of s 220 of the Act.

[8] The defence proceeded to tender certain formal admissions in terms of s 220 of the Act. The state led the evidence of four witnesses, namely Capt Magane, Palesa Sibeko, Nomvula Mokwai and Dr Skosana. Both the state and the respondent closed their respective cases thereafter.

[9] On 13 March 2018, the trial court, Phahlane AJ acquitted the respondent on all counts. The Court held that it could not confirm the contents of the s112(2) statement as it had been rejected by the state and that there was no reason that the Court could accept any of the admissions in the s 112 statement.

[10] Dissatisfied with the outcome, the applicant requested the Court *a quo* to reserve four questions of law as envisaged by s 319(1)[1] of the Act for consideration by this Court. The trial court refused the application.

[1] (1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall

[11] The applicant, still dissatisfied, lodged a petition to this Court in terms of s 317(5) read with s 319 (3) of the Act against the refusal by the trial judge to reserve the questions of law in its favour. The petition was referred for oral argument on 27 February 2019.

[12] This Court has to determine whether the trial court erred in refusing to reserve the four questions of law under s 319(1). S 322[2] of the Act sets out the powers that may be exercised by the Court of the appeal hearing an appeal relating to any question of law reserved under s 319.

[13] It bears mention that before a question of law may be reserved under s 319, three requisites must be met. First, the question must be framed accurately, leaving no doubt what the legal point is. Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record together with the question of law[3]. Where this is not done the question of law is not reserved correctly. It is against this background that I turn to consider the four questions that the state sought to have reserved as questions of law:

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state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.'
(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this s, be deemed to be questions of law.
(3) The provisions of ss 317(2)(4) and (5) and 318(2) shall apply mutatis mutandis with reference to all proceedings under this s.'

[2] S 322 reads–
(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may-
(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
(c) make such other order as justice may require:
Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

[3] *DPP, Western Cape v Schoeman and Another* [2019] ZASCA 158 para 39. See also *Director of public Prosecutions Natal v Magidela & Another* 2000 (1) SACR 458 SCA

[14] Question 1

'Was it permissible for the trial court in determining whether or not the state proved its case beyond a reasonable amount against the accused, to disregard the contents of s 112(2) of the Criminal Procedure Act 51 of 1977 statement in total as part of the evidential material in circumstances where the provisions of s 113 of Act 51 of 1977 was applied?'

[15] The Court *a quo* held that at the stage when the state rejected the s 112 statement, there were no other allegations made or admitted by the respondent apart from the s 220 admissions, which according to the Court, showed that the respondent had killed or raped the deceased. The Court stated further that:

'The minute the s 112 statement was rejected and no admissions were made regarding the contents thereof, it meant that the s 112 did not exist anymore and the onus remained with the state to adduce admissible evidence concerning the rape and stabbing of the deceased. The state having failed to do so, a conviction could accordingly not follow based on the same s 112.'

[16] S 113 of the Act 51 provides:

'(1) If the Court at any stage of the proceedings under s 112 (1)*(a)* or *(b)* or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the Court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the Court is of the opinion for any other reason that the accused's plea of guilty should not stand, the Court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: *Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the Court records a plea of not guilty, shall stand as proof in any court of such allegation*. (Emphasis added).

(2) If the Court records a plea of not guilty under subs (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.'

[17] The proviso to s 113(1) makes it clear that whatever admissions an accused makes during the s 112 proceedings stands as proof thereof before any court.[4]

[18] The adverse allegations that were admitted by the respondent in his s 112 statement, which 'stand as proof in any court' of those allegations were the following:

1. The respondent went to a local shop and informed Palesa that there was a work opportunity for a female person where he recently found employment.
2. Palesa introduced him to the deceased who accompanied him to the said work opportunity on 20 March 2017. They could not find the place.
3. On their way back, they took a short-cut through the bushes. The deceased had provoked him by accusing him of playing games with her and insulted him.
4. He unlawfully and intentionally stabbed the deceased, Y[...] F[…] S[…] with a knife.
5. He then took her cell phone, which was found at his place of residence.
6. He could see that she was going to die from the stab wound that he inflicted on her and left the scene only to return the following day where he set her body alight.

[19] It follows that the trial court committed a misdirection of law by disregarding the contents of the s 112(2) statement. Consequently, the first question reserved for decision must be answered in favour of the state.

[20] During cross-examination of the state witnesses, the defence did not dispute that respondent had murdered the deceased. The only issues in dispute were whether the murder was premeditated and whether he had raped her. The trial was conducted on this basis, and the trial court never indicated to the parties that the contents of the s 112 statement would be disregarded in determining the guilt of the respondent.

[4] *S v Hendricks* 1995 (2) SACR 177 (A).

[21] The allegations that were admitted by the respondent were corroborated by the contents of the post-mortem report. From this it appeared that the body of the deceased had been burnt over the face, anterior chest, pubic area and both thighs. There was also a 1 cm incised puncture wound with disembowelment.

[22] The respondent elected not to satisfy. There was thus sufficient evidence taken together with his admissions that he had killed the deceased and removed the cell phone from her body. By disregarding this evidence the trial court clearly erred.

[23] The parts of the plea explanation that remained in issue concerned the question whether the murder was premeditated and whether the respondent had raped and robbed the deceased. The state argued that the evidence established that the murder was pre-planned by the respondent as no employment offer existed; that he lured the deceased to a deserted area far away from houses; that he had armed himself with a knife and had tried to conceal evidence of the murder by burning the body of the deceased while she was still alive.

[24] There was, however, no direct evidence, apart from his admissions, as to what had transpired before the deceased was stabbed. The state therefore relied on the circumstantial evidence to establish premeditation. But Palesa Sibeko could only testify about how the deceased met the respondent and how her cellphone was recovered from the respondent. Nomvula Mokwai could only testify that she was also led to a house by the respondent where it later transpired that there was no job offer as promised by the respondent.

[25] Dr Skosana conducted the initial post-mortem report and testified that the deceased had head injuries, a stab wound in the abdomen, which led to the disembowelment and extensive burn wounds to the body. He also testified that the presence of carbon monoxide in the blood sample taken from the deceased indicated that she was alive when she was set alight.

[26] In his s 112 statement, the respondent stated that he returned to the scene of the murder the following day and set the body alight. The state has failed to prove the charge of kidnapping and the charge was correctly not pursued by the state.

Robbery could also not be proved as there is no evidence to show that the respondent was aware that the deceased was alive when he took her cellphone. The inference that respondent planned the murder of the deceased was therefore not the only inference to be drawn from the evidence. The state had thus failed to prove beyond a reasonable doubt that the murder was premeditated and that the respondent had robbed the deceased by taking her cell phone.

Question 2

[27] The second question is whether the trial court correctly held that the alleged verbal statement made by the respondent to Capt. Magane, an ex-officio justice of the peace, during the pointing out was inadmissible merely because it was not reduced to writing. This was relevant to rape charge.

[28] The respondent conceded, correctly, that the Court *a quo* erred in holding that the statement made by the respondent to Capt Magane that he raped the deceased was inadmissible because it was not reduced to writing. In terms of s 217 of the Act[5], a confession only needs to be reduced to writing when made to a peace officer. The confession made to a magistrate or justice of the peace need not be reduced to writing. Captain Magane is *ex officio* a justice of the peace.

[29] The second point of law was therefore also correctly reserved and ought to have been upheld by the trial court. This means that the verbal statement made by the respondent that he raped the deceased was an admissible confession. This confession does not take the matter any further as there was no evidence *aliunde* to show that the rape was committed.[6] In this regard, s 209 of the Act provides:

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[5] 217 Admissibility of confession by accused
(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: Provided-
(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in s 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that s, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and

[6] *S v Khumalo* 1983(2) SA 379 (A) 348B.

209 Conviction may follow on confession by accused

'An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.'

[30] Further Dr Skosana testified that he was unable to express an opinion on whether the deceased was raped because of the state of decomposition of the body. It follows that the state has failed to prove that the respondent had raped the deceased.

Questions 3 and 4

[31] The third question was whether the trial court correctly conceived and applied the legal principles pertaining to circumstantial evidence. The fourth was whether the trial court correctly considered the totality of the evidence in acquitting the respondent. Both questions were not properly reserved questions of law as they require this Court to inquire into whether the trial court assessed the facts correctly in arriving at its conclusion[7]. They do not raise a question of law.

[32] Corbett CJ in *Magmoed v Janse van Rensburg and Others*[8] held that a genuine question of law is whether the proven facts bring the conduct of the accused within the ambit of the crime charged. Such a question involved an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime.

[33] I am of the view that the third and fourth questions are questions of fact, rather than law and accordingly fall beyond the scope of what a court of appeal may decide under s 319. That being the case, the state's request must be refused.

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[7] *Director of Public Prosecutions, Western Cape v Schoeman and* Another [2019] ZASCA 158; 2020 (1) SACR 449 (SCA) para 39. See also *Director of Public Prosecutions: Limpopo v Molope and Another* 2020] ZASCA 69; [2020] 3 ALL SA 633 (SCA).

[8] *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A).

[34] The following order is made:

(i) The application for leave to appeal is upheld in respect of the application for reservation of questions 1 and 2.

(ii) The application for leave to appeal is dismissed in respect of the application for reservation of questions 3 and 4.

(iii) The application for leave to appeal against the acquittal of the respondent on the murder and theft counts is granted;

(iv) The appeal against the acquittal of the respondent on the counts of murder (planned or premeditated), rape and robbery is dismissed;

(v) The appeal against the acquittal of the respondent on the alternative counts of murder (without planning or premeditation) and theft is upheld;

(vi) The order of the Court a quo is set aside and substituted by the following:

(a) "The application by the state to reserve questions 1 and 2 as questions of law is granted.'

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(c) The accused is acquitted on the main counts of murder (with planning or premeditation) robbery and rape.

(d) The accused is found guilty of murder and theft."

(e) The matter is referred back to the trial court to consider an appropriate sentence

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K MATOJANE

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant(s): P W Coetzer
Instructed by: Director of Public Prosecutions, Pretoria
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