



**IN THE NORTH WEST HIGH COURT, MAFIKENG**

FULL BENCH CASE: CAF 10/13

In the matter between:-

**SHADRACK THAPELO (BUDA) SMITH**

Appellant

and

**THE STATE**

Respondent

**CRIMINAL APPEAL**

**LEEuw JP, HENDRICKS J AND CHWARO AJ**

**JUDGMENT**

**CHWARO AJ:**

**Introduction:-**

- [1] The Appellant was convicted by the trial court on four counts, being murder, robbery with aggravating circumstances, possession of a firearm without a licence and possession of ammunition

without a licence in respect of a firearm capable of discharging the said ammunition and sentenced to life imprisonment in respect of the murder count , fifteen (15) years imprisonment for robbery with aggravating circumstances, three (3) years imprisonment for possession of a firearm without a licence and two (2) years imprisonment for unlawful possession of ammunition.

- [2] This is an appeal against both conviction and sentence. Leave to appeal having been granted by the court *a quo* to the Full Bench of this division.

**Background:-**

- [3] On the 30 April 2011, Mr Andre Leon van der Merwe (“the deceased”) was attacked and murdered by assailants at his farm situated at Gestoptefontein in the district of Ottosdal. A post mortem examination conducted revealed his cause of death as “head injury due to gunshot to the head”. These assailants also robbed him of his belongings consisting of a Toyota single cab bakkie, cash, groceries and clothing. As fate will have it, one of the assailants was found by the police in an unconscious state following an accident which resulted in the capsizing of the deceased vehicle along the Ottosdal-Delareyville road. He was subsequently admitted at the local hospital and upon regaining consciousness, was taken for questioning by the police who suspected foul play after having found a firearm lying next to the vehicle with some other items. His questioning by the police resulted in him, Thabo Matlhoko, being arrested and later charged together with Paul Diphaphang Kwakwa, previous accused 2 and

Shadrack Thapelo Smith, the Appellant, as co-accused in respect of the four counts referred to above.

- [4] The firearm which was found next to the capsized vehicle was positively linked with the murder of the deceased. After having been shot at, the deceased was then tied to and dragged behind his own vehicle by the assailants and his body was later dumped in the maize field next to the farm and the assailants made their way with the said vehicle, cash robbed from his house, groceries and clothing. Thabo Matlhoko made some pointing outs to the police and was subsequently convicted of all four counts and sentenced in the same manner as the Appellant herein. Previous accused 2 was found not guilty and discharged at the end of the trial.
- [5] It is common cause that the respondent did not have any independent evidence upon which the Appellant could have been convicted except for the confession which the Appellant allegedly made to a member of the SAPS, Captain Mogatlanyane, a day after he was arrested. The Appellant contested the admissibility of the alleged confession during a trial-within-a trial but the trial court ruled that the confession was made freely and voluntarily and was thus admissible.
- [6] The Appellant's basis for contesting the admissibility of the alleged confession made by him during the trial was to the effect that he never made any such statement and to that effect, never appended his signature to the alleged confession statement, either

in the form of initialling each page or signing at the last page of the said statement, which was marked as Exhibit R1.

[7] In dealing with the Appellant's version, Captain Mogatlanyane testified that the Appellant signed a pro-forma form, Exhibit R, to which the hand-written confession statement was attached. He further testified that after taking the statement from the Appellant, who was communicating to him in Setswana, the Appellant had to be excused as he was going for supper. After the Appellant had left him, he, Captain Mogatlanyane, effected some corrections on the statement which were to ensure that his hand-writing is readable. He personally never made and/or caused the Appellant to sign the said statement but handed the unsigned statement to his senior, Colonel Dince, who was to ensure that the Appellant signs it before handing it over to the investigating officer. Colonel Dince never testified during the trial to state his version of events but what transpired and appears *ex facie* the last page of the alleged confession statement, is a signature which the Appellant denies to be his and which the Respondent could also not establish whether it was that of the Appellant.

[8] From perusal of Exhibit R1, it is apparent that the signature which appears thereon, just above the certification by the commissioner of oaths, is that of one "Matlhoko" who happens to be the previous accused 1 and not the Appellant.

### **The issue:-**

- [9] The Appellant raised a total of three grounds to assail his conviction by the trial court. However, in my view the most decisive ground of appeal which is capable of disposing of the matter relates to whether the confession, which was allegedly made by the Appellant and upon which he was convicted, met the requirements of section 217 of the Criminal Procedure Act, No. 51 of 1977 (“Act 51 of 1977”).

### **Analysis of the issues :-**

- [10] Section 217 of Act 51 of 1977 provides thus:

“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.....”

(my emphasis)

- [11] The above provision entails that the Respondent bears the onus to proof beyond reasonable doubt that the statement was made voluntarily and freely by the Appellant, in his sober senses and in the absence of undue influence.

See: **S v Mphahlele and Another 1982 (4) SA 505 (AD)**; and

**S v Zuma and Others 1995 (1) SACR 568 (CC)**

- [12] Our courts have always cautioned that where there is no other independent evidence upon which an accused may be convicted, save for the confession, there must be a careful and particular assessment on the admissibility of the confession.

See: **S v Zulu and Another 1998 (1) SACR 7 (SCA)** at page 13d-e

**S v Mkwana 1966 (1) SA 736 (A)** at page 745G-H

**S v Mokoena and Others 2006 (1) SACR 29 (W)** at page 37f-g

- [13] It is on the basis of the authorities outlined above that the court a quo should have evaluated the totality of the evidence led by the Respondent in determining whether the onus to prove beyond reasonable doubt that the Appellant made the confession as contained in Exhibit R1 was discharged. In doing so, it is my view that the trial court should have considered the evidence of Captain Mogatlanyane in total, especially the following version of his evidence elicited from cross-examination in the main trial:

“My instructions are that the statement that he made to you does not have these contents that you have in this statement. --- He did not give me any other statement except this one.

And further that the statement that he gave to you was not signed ---- I do not deny that. As I have already said I gave him a chance to go and have supper and he was supposed to have returned to sign that.”

[14] A cursory perusal of the last page of Exhibit R1 clearly and unequivocally indicates that the signature appearing thereon was not that of the Appellant. This is confirmed and corroborated by Captain Mogatlanyane's concession under cross examination that he could not deny the fact that the Appellant did not sign the statement that he gave him. Surely, the facts speak for themselves.

[15] The trial court was not supposed to have been clouded by its earlier ruling during a trial-within-a-trial to the effect that the alleged confession was made freely and voluntarily by the Appellant. It is trite law that a ruling on admissibility made during a trial-within-a-trial is interlocutory in nature and may still be reviewed by the trial court in the light of later evidence tendered.

See: **S v Mkwanazi 1966 (1) SA 736 (A)** at page 742H-743A; and  
**S v Muchindu 2000 (2) SACR 313 (W)** at page 316f-g

[16] On the totality of the evidence tendered by the Respondent and the Appellant on the confession, the following is apparent:

- That Exhibit R, the *pro forma* form which deals with explanation of constitutional rights was signed by the Appellant;
- That Exhibit R1, a hand-written statement taken by Captain Mogatlanyane, was neither initialled on each page nor signed on the last page by the Appellant;

- That Captain Mogatlanyane conceded that he did not let the Appellant sign the statement that he took from him; and
- That the hand-writing which purports to be a signature and appearing on the last page of Exhibit R1 refers to “*Matlhoko*” which happens to be the surname of accused 1 and not the Appellant’s.

[17] In the premises, I am of the view that the statement tendered by the Respondent as Exhibit R1 which was purportedly a confession made freely and voluntarily by the Appellant did not meet the requirements of section 217 of Act 51 of 1977, in that the Respondent did not prove beyond reasonable doubt that the Appellant was its maker and therefore admissible against him to the extent of securing his conviction.

[18] During argument before us, *Ms van Niekerk*, Counsel for the Respondent, conceded, correctly in my view, that there was no other independent evidence upon which the Appellant could have been convicted, except for the alleged confession. Should the confession be assailed successfully, then it follows that a conviction cannot be sustained.

### **Conclusion:-**

[19] This is surely one of those cases where the ordinary members of the public would be justified to argue that the administration of justice is brought into disrepute through the setting aside of a conviction in a manner set out in this judgment. This is more so if



regard is had to the manner in which the crimes committed herein were done as *Mr Skibi*, Counsel for the Appellant, correctly submitted. However, the function of our Courts is primarily to ensure that justice is administered in a fair and constitutionally sound manner. Courts cannot allow a conviction which is fraught with clear unfairness and which is not in conformity with the legislative prescripts governing the admissibility of confessions to stand. To do otherwise will be acting in clear conflict with the dictates and tenets of a right to fair trial as envisaged in the Constitution. The manner in which the police officials mentioned in this judgment handled the process of taking the alleged confession by the Appellant leaves much to be desired. It was indeed shoddy.

[20] In the premises, the Appellant's conviction, which is solely based on his alleged confession made to Captain Mogatlanyane, cannot be sustained. It follows automatically that if the conviction is set aside, the sentence should also be set aside. It is on this basis that an order for the immediate release of the Appellant was made at the hearing of this matter.

**Order :-**

[21] Consequently, the following order is made:-

1. The appeal against conviction and sentence is upheld.
2. The Appellant's conviction and sentence on all four counts is set aside.

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**O K CHWARO**

**ACTING JUDGE OF THE HIGH COURT**

I agree

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**R D HENDRICKS**  
**JUDGE OF THE HIGH COURT**

I agree

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**M M LEEUW**  
**JUDGE PRESIDENT OF THE HIGH COURT**  
**APPEARANCES:**

|                               |                           |
|-------------------------------|---------------------------|
| COUNSEL FOR THE APPELLANT:    | ADV SKIBI                 |
| COUNSEL FOR THE RESPONDENT:   | ADV VAN NIEKERK           |
| ATTORNEYS FOR THE APPELLANT:  | LEGAL AID SA,<br>MAFIKENG |
| ATTORNEYS FOR THE RESPONDENT: | DPP, NORTH WEST           |
| DATE OF HEARING:              | 29 NOVEMBER 2013          |
| DATE OF JUDGMENT:             | 12 DECEMBER 2013          |