IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO: CA309/2006

DATE HEARD: 4/2/08

DATE DELIVERED: 21/2/08

NOT REPORTABLE

In the matter between:

ZENIXOLE MAHLATI **APPLICANT**

and

THE STATE **RESPONDENT**

The only issue in this appeal was whether admissions made by the appellant in a warning statement were admissible because the policeman who took the statement had not required the appellant to certify that the contents were true and correct. It was held that s 219A of the Criminal Procedure Act 51 of 1977 only required that an admission would be admissible if it was not a confession and it was voluntarily made. The strong credibility findings in favour of the policeman and adverse to the appellant were not attacked and formed the basis for the trial court's acceptance of the admissions. The appeal was dismissed.

JUDGMENT

PLASKET J

[A] INTRODUCTION

[1] On the morning of 28 August 2004, Mr Michael Riddin and his son, Mr Timothy Riddin, left their home on the farm Sweet Fountain near Bathurst to hunt. They left their domestic worker of many years service, Ms Kholiswa Mcetywa, at the homestead. When Timothy Ridden returned to the homestead at lunchtime he discovered that the house had been ransacked and Ms Mcetywa had been seriously assaulted and, although alive, was in a coma. She died two weeks later in hospital. A substantial number of items of property, including firearms, hi-fi equipment, two cell phones, clothing and cash was stolen.

[2] That evening one of the firearms that was stolen, a 7.65 mm CZ pistol, was recovered after the appellant was seen in possession of it and was confronted by a policeman. The appellant was ordered to place the firearm on the ground which he did, but he then fled. He was only arrested about two weeks later.

[3] He and three others eventually stood trial before Maqubela AJ and two assessors on charges of housebreaking with intent to rob and robbery with aggravating circumstances, this being count 1, and murder, this being count 2.

[4] Two of the accused were acquitted of these charges, Maqubela AJ being in the minority on this issue. These accused were, however, convicted of the unlawful possession of stolen property. The appellant and accused number 4 were convicted as charged. Both were sentenced to 10 years imprisonment on count 1 and 24 years imprisonment on count 2, the former sentence running concurrently with the latter.

[5] The appellant was granted leave to appeal against conviction only. In granting leave, Maqubela AJ held that another court ‘may find that reliance placed by the court’ on a statement made by the appellant ‘was misplaced

and that the appellant's version was reasonably possibly true. In other words, if the court finds that reliance was misplaced, then the position will be in the same as that of the previous accused 1 and 3'.

[6] Pursuant to leave being granted in these terms, the appellant's Notice of Appeal lists his grounds of appeal as follows:

> '1. that the Honourable trial court erred in placing reliance on the contents of Applicant's warning statement due to the inadequate certification of the truthfulness and accuracy of the contents thereof by Applicant;
>
> 2. that without such evidence the remaining evidence was, as in the case of Accused Nos. 1 and 3 at the trial, there was a reasonable doubt that Applicant was involved in the actual commission of the housebreaking with intent to rob and robbery (Count 1) or in the murder of the deceased (Count 2); and
>
> 3. that, accordingly, Applicant ought to have only been convicted of possession of stolen property in respect of Count 1 and ought to have been acquitted on Count 2.'

[B] THE EVIDENCE AGAINST THE APPELLANT

[7] As already stated, the appellant was in possession of the 7.65 mm CZ pistol stolen from Sweet Fountain farm on the evening of the 28 August 2004, and the firearm was recovered. When he was arrested, on 14 September 2004, he was found to be in possession of other property stolen at the same time and he led the police to yet other items.

[8] Accused number 1 was arrested on the morning of 29 August 2004. He led the police to a place where he pointed out articles stolen from the Riddins that had been hidden in bushes. These articles included two .22 rifles, an R4 rifle and ammunition.

[9] The appellant made a warning statement to Inspector Nqabeni Manzana of the South African Police Service in which he admitted that he and others had gone to Sweet Fountain farm on the morning of 28 August 2004 and that they

went there with the intention of taking money from a safe inside the house. At this point, Manzana terminated his interview of the appellant because he believed that the appellant was about to implicate himself.

[10] The appellant's version was that, on 28 August 2004, he, accused number 1 and accused number 3 went to a farm to steal pineapples. Having done so, they went to 'a bush in which we used to hide our pineapples'. There they found the articles that had been stolen from the Riddins a few hours before.

[11] They helped themselves to those articles that took their fancy and left the rest hidden in the bushes. That evening he was forced to give up his possession of the pistol in the circumstances outlined above.

[12] This version was, not surprisingly, rejected by the court below as being false beyond a reasonable doubt, Maqubela AJ finding that 'insofar as accused 2 and 4 are concerned, they were only consistent insofar as they were both poor and evasive witnesses'. He found too that their account 'as to how they got to be in possession of the complainant's clothes and their denial of what they said to the police is nothing other than a mere fabrication'. His assessors were of the view, however, that the same version given by accused number 1 and accused number 3 was reasonably possibly true because 'there is a reasonable possibility that accused 2 could have gone there [i.e. the farm] earlier, took the loot with whoever, and stashed it in the bushes and he did not tell his friends about these articles and pretended that he was also surprised as they were'. While it is not necessary to deal with this reasoning for purposes of this appeal, it strikes me as being speculative in the extreme and to describe this scenario as a reasonable possibility stretches the meaning of the word reasonable.

[13] On the totality of the circumstantial evidence against the appellant, taken

with his false explanation of his possession of the Riddin's property and his admission that he and others had gone to Sweet Fountain Farm to steal, Maqubela AJ concluded that the only reasonable inference to be drawn was that he and accused number 4 had gone to the Riddin's house, 'they assaulted the deceased and left with the articles belonging to the complainant and the deceased died as a result of that assault'. He accordingly convicted the appellant (and accused number 4) as charged.

[C] THE ISSUE ON APPEAL

[14] As the notice of appeal foreshadowed, the central issue in this appeal is whether the statement made by the appellant was admissible given that it was not, on the appellant's argument, properly certified by him as being true and correct.

[15] Mr McConnachie, who appeared for the appellant, defined the issue in his heads of argument as follows:

> '10. Inspector Manzana himself admitted under cross-examination that the certification by appellant of the correctness of the contents of the document as a record of the interview only related to the *pro forma* section thereof, namely the explanation of his rights, and not to the contents of Annexure "B" of Exhibit "F".
>
> 11. In the absence of such certification it is submitted that the court *a quo* misdirected itself in having reliance upon the contents of Annexure "B" of Exhibit "F" and that his [i.e. the appellant's] culpability ought to have been decided on the same basis as Accused Nos. 1 and 3 at the trial.'

[16] I have made my views plain on the acquittal of accused number 1 and accused number 3 by the assessors outvoting the trial judge. To that must be added one observation: if they should not have been acquitted, the appellant cannot expect that we would perpetuate that injustice by acquitting him too on the same incorrect premise.

[17] Be that as it may, the issue to be decided is whether the failure by

Inspector Manzana to have the appellant certify that what he told Inspector Manzana in the body of the statement was true and correct affects the admissibility of the admissions made therein.

[18] It is important to bear in mind that Maqubela AJ made favourable credibility findings in respect of the policemen who testified, including Inspector Manzana concerning the taking of the statement. He stated that it was 'inconceivable that they could have concocted their evidence, insofar as [they] described what was said to them…'. He stated specifically about Inspector Manzana that 'there is no evidence of wrong-doing in his conduct of the investigation insofar as the witness statement relating to accused 2'.

[19] Maqubela AJ made equally strong, but adverse, credibility findings against the appellant, describing his (and accused number 4's) evidence of what they told the police as 'nothing other than a mere fabrication'. The credibility findings that were made are not attacked on appeal -- and nor could they be attacked with any hope of success.

[20] Whether the appellant's admission was admissible must be determined with reference to s 219A of the Criminal Procedure Act 51 of 1977. This section provides:

> '(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: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained –
>
> a) be admissible in evidence against such person if it

appears from such documents that the admission was make by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and

b) be presumed, unless the contrary is proved, to have been voluntarily made by such a person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.

2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).'

[21] Section 219A prescribes no formalities, such as are contended for by the appellant, for the admissibility of an admission: if it is not a confession and is proved to have been voluntarily made, it is admissible against the person who made it. It is not contended that the admissions made by the appellant amount to a confession, and they clearly do not. Maqubela AJ recorded in his judgment that when the appellant was with Inspector Manzana 'there was good cooperation between them and he was never forced to do anything against his will'. This accounts for the voluntariness of the making of the statement, an issue that is, however, not relied upon by the appellant. The two pre-conditions for admissibility have therefore been satisfied.

[22] Mr Coetzee, who appeared for the State, contended correctly that 'none of the requirements for admissibility were disputed' in the trial and 'only a credibility finding was required as to whether the admissions were made or

not'. As I have made clear, Maqubela AJ's unchallenged credibility findings were strongly in favour of Inspector Manzana and as strongly against the appellant. Maqubela AJ thus accepted by implication that the appellant made the admissions, that they were correctly recorded, that Inspector Manzana read back the admissions to the appellant and that the appellant did not wish to amend the contents of the statement.

[23] That being so, there is no merit in the point taken in his appeal. The appeal is dismissed.

_____

C. PLASKET

JUDGE OF THE HIGH COURT

I agree:

_____

A. ERASMUS

JUDGE OF THE HIGH COURT

I agree:

_____

D. VAN ZYL

JUDGE OF THE HIGH COURT

APPEARANCES
For the appellant: Mr JC McConnachie, instructed by the Legal Aid Board, Grahamstown
For the respondent: Mr JC Coetzee, of the office of the Director of Public Prosecutions, Grahamstown