**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/NO** |

**Case number**: A100/2020

In the matter between:

**LWAZI ZAMISA** Appellant

and

**THE STATE** Respondent

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**CORAM:** **LOUBSER, J *et* RAIKANE, AJ**

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**JUDGEMENT BY:** **LOUBSER, J**

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**HEARD ON:** **16 NOVEMBER 2020**

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**DELIVERED ON:** **19 NOVEMBER 2020**

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[1] The Appellant in this appeal was convicted on two counts in the Bethlehem Regional Court, namely on one count of robbery with aggravating circumstances (Count 1) and one count of murder (Count 2). On Count 1 he was sentenced to 15 years imprisonment, and on Count 2 he was sentenced to life imprisonment. He now appeals against both the convictions and sentences.

[2] In the trial court, the Appellant appeared with a co-accused, who was accused number 2 in the proceedings. That accused was found not guilty and discharged on the same charges. The case against him rested on certain pointings out that he had made to the police, but the magistrate ruled after hearing evidence in a trial within a trial, that the Respondent had failed to prove that the pointings out were made freely and voluntarily by accused number 2. Since there was no other evidence linking accused number 2 to the crimes before the court, he was eventually found not guilty. The case against the Appellant likewise consisted of only a confession he has made to a police officer. That confession was allowed as evidence against the Appellant after the court heard evidence in that regard in another trial within a trial.

[3] As the Appellant was sentenced to life imprisonment, he enjoys an automatic right of appeal. In the notice of appeal it is contended that the trial magistrate erred in convicting the

Appellant, because the Respondent has failed to prove the case against him beyond reasonable doubt. Clearly, this ground of appeal pertaining to the convictions must be interpreted as a challenge to the admission of the confession. As for the sentences, it was submitted in the notice that the sentence of life imprisonment is shocking and inappropriate, and that another court would impose a different and more appropriate sentence. It is further submitted that the circumstances of the Appellant justify deviation from the prescribed minimum sentences.

[4] The charges against the Appellant arose from an incident that took place on 1 November 2017 in the district of Bethlehem. On that date the deceased in the matter, a businessman of foreign origins, was assaulted and killed. After the assault, the perpetrators stole his Kia motor vehicle and dumped him from a bridge into the Liebenbergsvlei River some distance outside Bethlehem. A heavy rock was tied to his feet to ensure that he would sink under the water. The body of the deceased was discovered by a passer-by in the morning where it was visible in the water under the bridge. According to the autopsy report, the deceased died of drowning. There was no trace of his Kia vehicle.

[5] A motor vehicle sales agent from Vereeniging testified in the trial court that the two accused before the court arrived with the Kia in question at a motor dealer in Vereeniging. They were in the company of a Nigerian male person, who wanted to sell the vehicle. The Nigerian negotiated the sale with the dealer while the two accused were sitting outside. The motor dealer eventually

purchased the vehicle. After some days, the accused who is now the Appellant, arrived with the police at the dealership, where the Kia in question was found.

[6] This evidence constituted the only evidence against the Appellant, save for the contents of the confession he had made. Several witnesses were called by the respondent to testify in the trial within a trial after the court was informed that the confession was not made freely and voluntarily. The only evidence that was tendered to this effect by the Appellant, was that a major Makgotho had interrogated him after he was brought to the police station together with other suspects in the case. According to him, Makgotho had threatened him in his office by his body language and by the manner in which he spoke. He was afraid of Makgotho because he had heard earlier from people in the community that he was a man known for assaulting suspects to make them talk. When he told Makgotho what he knew, Makgotho reduced his version to writing in a statement saying that he would be taken to a captain Marius Nel where he will confirm the statement he had given to Makgotho.

[7] When he was taken to Capt. Nel that evening, he never told him anything and Nel did not write down anything. Nel merely read out to him the statement he had made to Makgotho, and he confirmed that statement by signing on every page at the bottom. Although he alleged that his rights were not explained to him when he was taken into custody, he conceded that a written notice of rights was handed to him even before he was taken to the office of Capt. Nel. He also confirmed that it is his signature

that appears on the document recorded by Capt. Nel, and that the statement he had made to Makgotho contained the truth. According to him, that was the same statement read to him by Capt. Nel.

[8] I pause here to mention that at the time the Appellant was taken to Capt. Nel, he was already 24 years old. He also must have been a man of intelligence, because he had passed grade 12 at school.

[9] In his testimony Capt. Nel denied that he had ever seen, or had been aware of, any statement that the Appellant had made to Makgotho. When he recorded the version of the Appellant in his own handwriting, the Appellant appeared to be relaxed and at his sober senses. After he had read the version he had recorded to the Appellant, the Appellant was satisfied that it was recorded correctly, and he signed at the bottom of every page. The only other person present was an interpreter, who was not made use of, because the Appellant was fluent in English.

[10] Capt. Nel further testified that he had explained his rights fully to the Appellant before he took down his statement. The Appellant had no visible injuries, nor did he inform him of any undue influence he was subjected to.

[11] Major Makgotho testified that he had interrogated the Appellant on 1 November 2017 after he was brought to the police station together with others. This was after he had received a report of a dead body in a river some distance from Bethlehem. He did not

explain any rights to the Appellant, because he considered him to be a witness, and nothing more. After he had taken down the witness statement, he arranged with Capt. Nel that the Appellant would report to him for a confession. The major vehemently denied that he had threatened the Appellant in any manner, or subjected him to any undue influence. Capt. Nel was deployed in a different department of the police, and he sat in a different building.

[12] In his judgment the trial magistrate relied on the fact that the Appellant never alleged in his testimony that he was directly threatened by anybody to make confession. He also did not allege that he was told what to say when he made the statement to Capt. Nel. In addition, the testimony of Capt. Nel clearly showed that the Appellant was duly warned that he was under no obligation to say anything, and that his rights were duly explained to him. In the premises, I am of the view that there is nothing to indicate that the confession should not have been allowed as evidence. It also needs to be mentioned that there is sufficient evidence *aliunde* to corroborate the facts stated in the confession.

[13] I need not repeat here everything that was related by the Appellant in his detailed and lengthy confession. Suffice it to refer only to the main stages of the events as told by the Appellant. On a certain day, he and his co-accused were told by one Jerry that he needed their assistance to kill a person to steal his vehicle. He gave the co-accused a cell phone so that he could call them when the time was ripe.

[14] That evening Jerry called them on the phone and summoned them to his house. When they arrived, they found Jerry and the deceased eating. Jerry then told them to wait outside and enter again when he whistles. They then waited outside for some time until they heard the whistle. When they entered, Jerry was already holding the deceased from behind. The co-accused grabbed the deceased by the neck and began to choke him. The Appellant assisted by covering the mouth of the deceased with a cloth and later with his hands to prevent him from screaming.

[15] When the deceased eventually lost consciousness, Jerry drove the car of the deceased into the yard. They wrapped the deceased in a blanket and put him on the back seat of the vehicle. They then drove on the road to Reitz, and when they came to the river, they stopped and tied a big rock to the feet of the deceased. They then dropped him from the bridge into the river. They thereafter went to the house of the deceased where they found the registration papers of the vehicle. Armed with the registration papers, they then drove to Vereeniging to sell the car. Upon their arrival there, they found a car dealer. Jerry negotiated with him and sold the car to him for R10 000 in cash. After the sale Jerry paid them R 2 000 each, while he retained the remaining R 6 000.

[16] When the Appellant testified in the court *a quo* in his own defence, he confirmed the journey to Vereeniging, and the subsequent sale of the car there. Significantly, he also confirmed that he and his co-accused were paid R 2 000 each by Jerry after the sale took place. According to him, he did not know where Jerry got the car from.

Jerry only requested him and his co-accused to accompany him to Vereeniging in the car. When pressed in cross-examination to explain why Jerry had given them R 2 000 each after the sale, appellant merely said that it was a reward or a gift because they were willing to accompany him to Vereeniging. Having regard to the fact that, on his own version, he and his co-accused had played no part in the sale of the vehicle, this explanation makes no sense. The probabilities are overwhelming that they were rewarded for their assistance in killing the deceased and stealing his vehicle.

[17] In terms of Section 217 of the Criminal Procedure Act 51 of 1977, a police officer may perform the same duties as a magistrate when it comes to the taking of the confession. Furthermore, it speaks for itself that the confession under discussion contains an unequivocal acknowledgment of guilt as far as both the counts are concerned. I therefore come to the conclusion that the Appellant was correctly found guilty on both charges.

[18] I now turn to the question of sentence. It is clear from the facts of this case, as stated in the confession of the Appellant, that the murder of the deceased was a pre-meditated act. It is also clear that the robbery of the vehicle took place in circumstances that were aggravating. The crimes committed by the Appellant therefore falls within the ambit of Section 51 of the Criminal Law Amendment Act 105 of 1997, which prescribes a mandatory minimum sentence for robbery with aggravating circumstances of 15 years imprisonment, and for pre-meditated murder a minimum

sentence of life imprisonment. These are the sentences imposed by the magistrate in the present case.

[19] Section 51(3)(a), however, provides that a lesser sentence may be imposed where the court is satisfied that substantial and compelling circumstances exist. In the present case, the Magistrate was unable to find any such substantial and compelling circumstances. The appeal against sentence therefore turns on the question whether the magistrate was correct in finding as such.

[20] On behalf of the Appellant it was contended before us that compelling and substantial circumstances exist in his personal circumstances, for instance that he is relatively young and a first offender. The same grounds for finding compelling and substantial circumstances were suggested by the Appellant's attorney in the court *a quo*. In my view, however, the personal circumstances of the Appellant are outweighed by far by the horrendous manner in which the appellants and his co-perpetrators committed the crimes in question. I therefore find that the magistrate was correct in holding that there were no substantial and compelling circumstances that justified lesser sentences than the minimum sentences prescribed.

[21] The following order is therefore made:

1. The appeal against both the convictions and the sentences is dismissed.

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**P.J. LOUBSER, J**

I concur:

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**T.V. RAIKANE, AJ**

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| **For the Appellant:** | Ms. S. Kruger |
| **Instructed by:** | Legal Aid South Africa<br>Bloemfontein |
| **For the Respondent:** | Adv. M.M.M. Moroka |
| **Instructed by:** | Director of Public Prosecutions<br>Bloemfontein |