

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION MTHATHA
BIZANA CIRCUIT COURT

Case No: CC14/2022

In the matter between:
THE STATE

Vs

DELETE	WHICHEVER	IS	NOT
APPLICABLE			
(1) REPORTABLE: <u>YES</u> .			
(2) OF INTEREST TO OTHER JUDGES: <u>YES</u>			
(3) REVISED.			
<u>DATE</u>			
<u>SIGNATURE</u>			

FEZILE SOMADLANGATHI

Accused

JUDGMENT

BROOKS J:

[1] The accused is a 27 year old male resident of Ntshikintshane Administrative Area, Flagstaff, Eastern Cape.

[2] In the amended indictment he is charged of murder in contravention of section 84 of Act 9 of 1983 read with section 51(1) of Act 105 of 1997. The basis of the charge is an allegation that upon or about 15 January 2021 and at or near KwaDinda Location, Flagstaff, in the district of Flagstaff, the accused acting in concert and in execution of a common purpose, did unlawfully and intentionally kill Noxolo Nancy Mesilane, an adult female, by stabbing her with a knife.

[3] The indictment continues to indicate that in the event of conviction the provisions of section 51(1) of Act 105 of 1997 (the Act) will be invoked on the basis that the murder was planned or

premeditated and was committed by a group of persons in the execution of a common purpose.

[4] The accused was represented by counsel throughout the trial. Before he pleaded both the accused and his counsel confirmed that they were aware that in the event of a conviction the minimum sentence applicable in terms of the Act would be life imprisonment. A deviation from the prescribed minimum sentence would only be competent if substantial and compelling circumstances were to be identified in the matter.

[5] The accused pleaded not guilty to the charge. As he is entitled to do, the accused made no outline of the basis of his defence.

[6] The first state witness was an adult male neighbour of the homestead in which the deceased was killed. He described in detail what he found at the scene. This evidence was corroborated by the second state witness, who was the chairman of the local policing forum who was summoned to the scene by the first state witness. Both witnesses identified the deceased as a policewoman employed by the South African Police Service and stationed at Qhasa Police Station.

[7] What both witnesses found at the scene was further corroborated by an indexed photograph album that was provisionally handed in as EXHIBIT A through the evidence of the third state witness, who was an adult male sergeant in the South African Police Service, who was also stationed at Qhasa Police Station at the time. He attended the crime scene in response to a report made by the second state witness.

[8] The state then sought to introduce into the evidence a warning statement, utilising the provisions of section 219A of the

Criminal Procedure Act 51 of 1977, (the CPA), on the basis that the warning statement contained admissions made by the accused. Counsel for the accused objected to the introduction of the statement. He did so on the basis that the warning statement had not been made freely and voluntarily.

[9] In the circumstances a-trial-within-a-trial was declared. The state witness in the trial-within-a-trial was the investigating officer, who was a warrant officer at the time and a member of the Organised Crime Unit in Mthatha. She testified about the arrest of the accused and the circumstances leading up to the taking of the warning statement.

[10] It is apparent from her evidence that she has been the investigating officer appointed to the case from the outset. It was she who questioned the accused once he had been brought to Bizana Police Station and who had taken the warning statement. According to this witness, at the outset, before the interview commenced, she informed the accused of what she termed loosely, "his rights". Amongst these were the right to remain silent and not to respond.

[11] According to her, after she told him more about the nature of the offence and the investigation, "he did not respond, he just kept quiet and looked at me". Undeterred, she apparently persisted and proceeded to address the accused whereupon she says, "he then told me that he can tell me something regarding that". She testified that she again, "Reminded him of his rights" and proceeded to obtain a warning statement.

[12] Cross-examination of the investigating officer revealed that the accused had arrived with her at Bizana Police Station at approximately 17h00 on the day of his arrest. She began with the interview process. This must have taken a lot longer than

suggested by her evidence in chief because she stated that after the accused had completed the narration, he was detained. She then said the warning statement was obtained at 08h00 the following morning and “as I was still awake, I made my statement”. This detail emerged as part of an explanation about why the warning statement lacks crucial details relating to the date and time it was taken.

[13] The investigating officer stated earlier, “Because we were working from the 24th up to the 25th, we just did not sleep. I just worked through”. The differences between the apparent ease with which the investigating officer’s evidence in chief suggests she was able to obtain the accused’s compliance and the length of time suggested strongly by her evidence under cross-examination, must raise some doubt about her reliability as a witness.

[14] The pro-forma section of the warning statement is unhelpful. It was apparently wrongly dated, “2021-01-2”. In her evidence in chief the investigating officer stated that she had omitted the numeral 1 at the end of the date, as the statement had been obtained on 21 January 2021.

[15] Under cross-examination, she was taken to task on this aspect, and she requested access to the docket to be able to refresh her memory. Having been afforded this opportunity, she changed her evidence with conviction, stating that the warning statement had been taken on 24 January 2021.

[16] With the content of the docket and with the accused’s version on instructions, counsel for the defence took the matter further. A second request for access to the docket was made by the investigating officer and was granted. This produced a third version namely, that the warning statement had been taken on 25 January 2021. This version now agreed with the date given by

the accused to his counsel.

[17] Although occurring immediately alongside the space allocated on the form, on the proforma for the recordal of the date, the space allocated to the time at which the warning statement was made, was not filled in. The time 08h00 was an estimate made by the witness whilst describing how she had worked through the night.

[18] No resort was had to any record of the date and time of the detention of the accused or to the date and time when he was taken out of the cells to make the warning statement. In this regard one might imagine the occurrence book to have been of assistance. The unsatisfactory aspects of the investigating officer's evidence become a cause for increasing concern where they cannot be explained by resorting to official station records.

[19] In *Gcam-Gcam v S* 2015 (2) SACR 501 (SCA), the Supreme Court of Appeal stated the following at paragraph 49:

“When confronted with confessions made by suspects to police officers whilst in custody – even when those officers are said to be performing their duties independently of the investigating team – courts must be especially vigilant. For such people are subject to the authority of the police, are vulnerable to the abuse of such authority and are often not able to exercise their constitutional rights before implicating themselves in crimes. Experience of courts with police investigations of serious crimes has shown that police officers are sometimes known to succumb to the temptation to extract confessions from suspects through physical violence or threats of violence rather than engage in the painstaking task of thoroughly investigating a case. This is why the law provides safeguards against compelling an accused to make admissions and confessions that can be used against him in a trial.”

[20] Under cross-examination it was put to the investigating officer that the accused's version was that she had resorted to the use of pepper spray filled plastic bags being pulled over the accused's head and held close under his jaw in order to persuade him to cooperate. To this was added a novel technique by which a plastic bag was held vertically over the accused's toes whilst its bottom end was set alight, causing burning and melting plastic to drop onto his toes.

[21] All of this was denied. However, still no detail was given to explain why the interview was indeed, as long as it had now emerged was the case and why the investigating officer had been obliged to work through the night.

[22] Once again, in *Gcam-Gcam (supra)*, the Supreme Court of Appeal gives guidance at paragraph 48 on the correct approach to be adopted, stating as follows:

“It is not necessary to deal with the evidence of the police in any detail. And I accept that the learned judge was correct in finding that much of the appellant's evidence was untrustworthy. But I think he too readily accepted all the evidence of the police without properly analysing it and did not properly consider those aspects of the appellant's evidence that were reasonably possibly true despite his mendacity. In fact, the judge misdirected himself by approaching the evidence of the appellant on the basis that he (and his co-accused) needed to ‘put up credible versions’ to refute the ‘overwhelmingly strong and convincing evidence’ of the police regarding the admissibility of the confessions. All that was required of the appellant was to present a version that was reasonably possibly true, even if it contained demonstrable falsehoods.”

[23] The accused did give evidence in the trial-within-a-trial. Indeed, it must be recorded that he gilded the lily, claiming that male policemen had also taken part in assaulting him by holding

his legs out and down whilst he was handcuffed and seated on the floor, then jumping on his legs and his stomach. These details had not formed part of the content of the evidence relating to the assault that had been put to the investigating officer.

[24] In essence however, the accused contended that he did not want to talk to the investigating officer, but after a lengthy process of what he described as torture during a long interview, where he was given all the details about the offence, he eventually capitulated.

[25] It is apposite at this point to make the observation that the police stations of Qhasa, Mount Ayliff, Flagstaff and Bizana are all closely situated geographically.

[26] The deceased was a female member of the South African Police Service. The news of her awful fate would have spread easily and naturally amongst the members of the South African Police Service deployed at those stations. There can be little doubt that it then spread quickly over a wider part of the province.

[27] Moreover, a photograph album containing graphic details of the barbaric manner in which the deceased had been slaughtered had been prepared days before the arrest of the accused. According to the investigating officer only claims made by undisclosed police informers implicated the accused.

[28] Even though she was stationed at Mthatha at the time, it is reasonable to imagine that the investigating officer would have been incensed at the death of a fellow female colleague.

[29] Against this background and seen in conjunction with the weaknesses in the evidence given by the investigating officer, it is a reasonably possibly true that the accused did not make the

warning statement to her freely and voluntarily.

[30] Before leaving the issue of the warning statement, something needs to be said about the inappropriateness of its structure. On page 2 of the pro-forma is a space in which the statement itself maybe recorded. Thereafter, on the next page the following question is posed, “Were you in anyway threatened, assaulted or influenced to make this statement and answer questions?”

It makes absolutely no sense to have placed this vital question after the section in which the statement is recorded. The question and the possible answers thereto are central to the issue of whether or not the warning statement is to be made freely, voluntarily, and therefore, for obvious reasons, ought to be a question asked before any statement made by a suspect is recorded.

[31] In this matter the investigating officer confirmed that she had followed the sequence of the questions as they found expression on the form. Accordingly, she claimed that she had asked this question after she had recorded the statement from the accused and saw nothing wrong in this.

[32] It was necessary for the Court to explain to her why the sequence of the questions was offensive to the principles of constitutionality and ensuring that only statements that are made freely and voluntarily are recorded. Moreover, this portion of the form allows a suspect to identify the person who had assaulted, threatened, or influenced him or her to make the statement. Again, this opportunity ought to be given to the suspect before the statement is taken.

[33] In this matter, no details are recorded in respect of this element. The enquiry into the evidence has revealed that there

existed within the context of the interview, circumstances that permit for the possibility that the accused was assaulted as he claimed to have been.

[34] Using this pro-forma, how could it ever have been expected of the accused to disclose this fact either at this stage or before any statement was recorded, when the very person that he claims had assaulted him and pressurised him into making the statement, was the person before whom he now appeared.

[35] The warning statement should never have been taken by the investigating officer herself. With its potential for self-incrimination, a warning statement should always be taken by an individual who has not been party to any arrest or interview process that preceded the taking of the warning statement. Only at the end could it be said that a suspect had been given a fair and proper opportunity to disclose that he or she had been wrongly treated if this were the case.

[36] In the circumstances upon an assessment of all the relevant evidence the Court ruled that the warning statement was inadmissible as evidence against the accused.

[37] The state then sought the introduction of the evidence of a confession in terms of section 217 of the CPA. Counsel for the accused objected thereto on the basis that the confession had not been made freely and voluntarily. In the circumstances a second trial-within-a-trial was declared.

[38] The first state witness was a female member of the South African Police Services, a sergeant, who testified that on 25 January 2021, whilst still a constable stationed at Bizana Police Station, she was requested by the investigating officer to escort the accused to the office of Capt. Nongceke who wanted him for

the purposes of recording a confession.

[39] Her evidence was supported by an entry in the occurrence book that was handed in as EXHIBIT C. The entry is headed by the words, “prisoner out for confession” and records the event as occurring at 11h05. It is also supported by a statement that she made, handed in as EXHIBIT D, wherein she states that she was requested to escort the accused “to attend a confession session”. In the statement the time 11h05 is also mentioned. It was apparent from both her evidence and her statement that she was assisted by a male police officer as the accused is a male person.

[40] Under cross-examination, the witness was asked to look in the occurrence book for an entry confirming the return of the accused to the cells. This was found by her against an entry made at 12h30.

[41] The next witness was Capt. Nongceke, now retired. At the time he was a captain in the South African Police Service stationed at Bizana and therefore a justice of the peace. He testified that he came on duty at 07h30 on 25 January 2021 and was requested by the investigating officer to take a confession from the accused. The pro-forma that he utilised was handed in as EXHIBIT E and the captain read the content therein into the record.

[42] As he would have done during the interview, he commenced at the beginning of the form. The process, the questions and information thus communicated were interpreted into isiXhosa for the benefit of the accused by the court interpreter. The captain stated that on the day in question he had acted as the interpreter or translator as he recorded at the end of the proforma.

[43] One is entitled to assume that the process demonstrated in court reflected the process as it was on the day in question and took roughly the same amount of time. The process in court took approximately 40 minutes. The actual confession statement made by the accused was not included in the exhibits. However, the page numbering evident from the document that forms the exhibit indicates that it indeed was recorded on the inner section of the pro-forma. Capt. Nongceke confirmed what was evident from the exhibit namely, that the statement made by the accused covered nine A4 pages.

[44] In answers to questions posed by the Court, the witness confirmed that it had taken a long time to go through the pro-forma with the accused and to record in writing what he had told the witness. The observation by the Court that the actual statement was long, was agreed with and the witness then added that the lengthy process was contributed to by the accused who at times did not talk.

[45] By process of logical deduction based upon the evidence of the occurrence book entry and the sergeant who supported it by *viva voce* evidence, it must have taken at least 5 minutes to fetch the accused from the cells and to escort him to the captain and approximately the same length of time or slightly longer to respond to the summons by the captain to fetch the accused and to escort him back to the cells.

[46] Therefore, a conservative assessment of the use of the time period demonstrated in the occurrence book leaves 1 hour and 15 minutes available to the captain to deal with the accused. Of this period, if it were done as the captain claimed it had been, approximately 40 minutes would have been occupied by reading the pro-forma out to the accused and translating the questions and information into isiXhosa for him.

[47] Each of the 22 pages of the entire document was signed at the foot by both the accused and the witness. In addition, the thumbprint of the accused was placed next to his signatures. This group of signatures and thumbprint occurs in five places in the left hand margins of some of the pages in addition to its occurrence with regularity at the foot of each page.

[48] Done speedily and upon an assumption of four sets of signatures per minute, the entire process associated with signature and thumbprint entry onto the document must have taken about 8 minutes. The nett effect of the allowances that must be made for the processes referred to is that only 27 or so minutes remains of the time period taken for the recordal and interpretation back to the accused of a statement that is nine A4 pages in length. On a rough calculation this means 3 minutes per page. It is not possible to perform such a task at that rate, especially where the accused was silent at times, which must mean that somewhere in the completion of the pro-forma section corners were cut.

[49] There are disturbing features about the manner in which the pro-forma was completed that are revealed from the document itself. An examination of the original exhibit shows that the captain has a strong hand that is recorded in thick dark impressions on the page. He has a distinctive handwriting as one would expect. In contrast the signatures of the accused are imprinted with a lighter hand resulting in thinner and lighter impressions on the page. The captain testified that the accused had used the same pen as the captain had used and so one must conclude that the differences are attributable to the relative strength of their handwriting.

[50] These characteristics are uniformly expressed throughout

the pro-forma until one reaches the last page. At the foot of this page a space is provided for the signature of the justice of the peace. However, the captain did not sign it. Next to the signature of the accused, misleadingly identified on the pro-forma as “signature of deponent”, the captain’s hand is to be seen clearly in the entry of the place and the date.

[51] However, immediately below is a much lighter and thinner handwriting recording the time as 10h00. This same lighter and thinner handwriting is found at the foot of the page alongside the space where the captain ought to have signed as justice of the peace. The lighter and thinner handwriting records the place, date and time with a lightness, thinness and letter and numeral forms that are not found anywhere else in the entries made by the captain.

[52] Notwithstanding, the obvious visible differences in handwriting style described in the preceding paragraph, the captain claimed that it was he who had made all the entries pertaining to place, date and time. He explained that his failure to sign as justice of the peace was due to oversight as he had signed above already in his self-appointed capacity as a translator.

[53] The concerns surrounding the handwriting anomalies on the proforma are aggravated by the fact that the time recorded by the entries on the form in both instances is 10h00. Quite simply, this does not fit in with the times recorded in the occurrence book. The captain confirmed that he had arrived on time at 07h30, using his watch and the television at home to ensure that he was on time for work. Therefore, he concluded his recordal of 10h00 was an accurate reflection of the time the confession taking was concluded.

[54] Returning to the observations made about the length of time it would take to read through the proforma and translate each question, to record the answers, to record the actual statement, to read it back and translate everything for the accused and then to apply 27 sets of signatures and thumbprints, it would seem that if the captain is correct, he must have started the process at least around 08h00.

[55] It will be recalled that this was the estimated time given by the investigating officer in respect of the taking of the warning statement. It is not simply for the purposes of criticism that these concerns are highlighted. They are extremely relevant when regard is had to the evidence given by the accused in this second trial-within-a-trial.

[56] According to the accused he was taken to captain's office on two occasions. On the first occasion he asked the captain whether whatever was recorded by him would be given back to the police or will be given to the court. The accused said in his evidence that he was relieved to hear that the statement would not go back to the investigation team and so he told the captain that he knew nothing and was then taken back to the cells.

[57] Shortly thereafter, according to the accused, he was fetched from the cells and taken back to the office where the investigating officer had interviewed him earlier. He claimed that other police were there in the company of the investigating officer who said that what had just happened was not as they had agreed upon the day before. She told him that they had all the time in the world and that if the accused did not go back and tell "that man" what they wanted, they can "do things" to him.

[58] The accused was taken back to the captain a second time. He said that the police had told him that if he did not do what they

wanted, the same things would be done to him as had been experienced the day before.

[59] A little later in his evidence in chief the accused added that initially he had asked the captain if the statement would go back to the police because he did not want what had happened to him the day before to be repeated. Therefore, he stated the captain knew that he had been assaulted. He concluded by saying that he “signed” because he had been threatened.

[60] Under cross-examination, the accused agreed with the captain’s observation that at times he, the accused, remained silent. The accused explained that this was because he had to think about what he had been told to say the day before. The accused also stated that he could remember clearly that the captain read out “the rights” to him but could not recall other things been read out or translated. He stated that sometimes he just responded to a question in the affirmative because he was scared.

[61] Once again it would be fair and accurate to say that the accused may have gilded the lily when it comes to details about his experience. However, he bears no onus, and his version must be tested in the context of and together with all the available evidence in the state case. The onus remains squarely on the state to prove that the confession was made freely and voluntarily.

[62] Adopting the same approach as directed by the Supreme Court of Appeal in *Gcam-Gcam (supra)*, the Court cannot eliminate the possibility that there may be some merit in the accused’s version by referring to the evidence from the police.

[63] The investigating officer did not testify in the second trial-

within-a-trial. Given her inability to record the date and the time of the warning statement with accuracy, perhaps she would not have been able to give clarity into the mutually destructive evidence relating to the time when the confession was taken.

[64] What is clear is that the investigating officer directed the accused to a justice of the peace hot on the heels of his making a warning statement. Why this was necessary has not explained.

[65] The proximity of the dubious process of interviewing the accused and obtaining the warning statement is sufficiently close to the process of obtaining a confession to permit for a concern that the one experience indeed taints the other.

[65] If she were secure about the integrity of the warning statement one would have expected the investigating officer to proceed to arrange for a confession with less haste. It is also highly unsatisfactory that the justice of the peace tasked with taking the confession was a commissioned officer stationed at Bizana with an office in the same building as that used only a few hours before by the investigating officer.

[66] Given the close geographical proximity of the police stations that have been referred to in this matter and the identity of the deceased as a female member of the South African Police Force, it is highly likely that the captain had heard details about her murder. An application of the mind to this reality would immediately have excluded him as an appropriate justice of the peace to approach.

[67] In addition, in my view every possible step should be taken to avoid a situation where a suspect perceives the confession taking to be merely an extension of the investigation. If he or she has complaints to raise about assault or threats of assault or

inappropriate intimidation of any other kind, how can the use of “in house” commissioned officers of the South African Police Service be seen as providing an appropriate space within which to make reports against the investigators?

[68] More than once this court has been obliged to reiterate the preference for taking a suspect to a magistrate for the purposes of making a confession and the principles that lie behind the preference; see for example, *S v Ntantiso* an unreported judgment of this court under case number CC04/2015 delivered on 23 August 2017.

[69] Given that there is no satisfactory explanation for irreconcilable records pertaining to the time when the confession was taken, nothing excludes the possibility that the accused is truthful when he states that he made more than one trip to the office of the justice of the peace.

[70] The anomalies in the handwriting to be found on the confession pro-forma cause concern that permits of the possibility that the form was partly completed on the last page by a third party who inserted an incorrect time. Such an occurrence would violate the integrity of the process of taking a confession. Perhaps the time 10h00 is the time recorded somewhere, even if only mentally, as being the time of the accused’s first visit to the captain when it was expected that he makes a confession, but according to him did not.

[70] An identification of all of these possibilities indicates that once the police do not do their work properly, the door is opened for concern and doubt to enter the room. On a conspectus of all the available evidence at the close of the second trial-within-a-trial the Court was unable to exclude a reasonable doubt that the state had proven that the accused made a confession freely and

voluntarily.

[71] In the result the Court ruled that the confession made by the accused on 25 January 2021 be excluded from the state case against him.

[72] Thereafter, the state handed in the post-mortem report covered by affidavit and accompanying an identification of the body of the deceased and a report dealing with the issue of its transport.

[73] The cause of death of the deceased is identified in the post-mortem report as “extensive bleeding caused by injury to major neck blood vessels caused by stab neck” [*sic*]. The state case was then closed.

[74] Counsel for the defence made application for the discharge of the accused in accordance with the provisions of section 174 of the CPA. The section provides that if at the close of the state case no *prima facie* has been made out against an accused person, he or she is entitled to be acquitted.

[75] It is trite that the test at this stage is to assess whether there is any evidence before the Court upon which the Court acting carefully may convict the accused. None of the evidence placed before the Court links the accused in a manner that would enable this Court acting carefully to find that he is guilty of the offence with which he has been charged. It must follow that he is entitled to an acquittal on that charge.

[76] Understandably, this matter has attracted public interest. It demonstrates something of the appalling malady of femicide with which this country is plagued currently. It also combines therein an example of the all too frequent murder of members of the

South African Police Service. Most people who have taken an interest in this matter would have hoped for a conviction of the accused. No doubt they will view the outcome now as a failed prosecution. This would be wrong.

[77] Counsel for the state, Mr Mzinyathi, has conducted the prosecution in this matter with appropriate care and diligence. He has also demonstrated the high levels of competence and ethics that are required of an officer of this court. There has been no failure in the prosecution. What has regrettably been demonstrated all too clearly is a failure within the investigation of the matter.

[78] It is plain that this investigation was conducted in an unduly hasty and careless manner. This led to the compromise of the integrity of the investigation in a manner rendering it unconstitutional and destined for failure. No prosecutor should be presented with a docket that reveals such problems as are evident in this matter.

[79] The following order is made:

On count 1: The accused is found NOT GUILTY and is DISCHARGED.

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RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

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Date Delivered: 21 August 2023