IN THE HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[redacted] 5/5/2025

SIGNATURE DATE

CASE NO: AA 09/2022

In the matter between:

PRESIDENT PHOSHOKO **APPELLANT**

and

THE STATE **RESPONDENT**

Heard : **22 November 2024**
Delivered : **5 May 2025 by circulation to the parties' legal representatives**
Coram : **NAUDE-ODENDAAL J et DIAMOND AJ et PILLAY AJ**

JUDGMENT

PILLAY AJ

[1] The appeal that serves before this court centred around the custom of a blood pact, involving individuals not related by birth, swearing loyalty through a ritual where they make small cuts and touch the wounds, symbolising a shared bond of blood and commitment. The appellant and co-accused took this ritual to a new level of commitment. The appellant and his co-accused were convicted in the High Court of South Africa, Limpopo Division Polokwane, on 16 April 2014, on a charge of murder read with the provisions of Section 51(1) part 1 of Schedule 2 of the Criminal Law Amendment Act,[1] The appellant and his co-accused were acquitted on count 2 of robbery with aggravating circumstances. In respect of Count 1, he was sentenced to life imprisonment and his co-accused was sentenced to 15 years imprisonment on 3 February 2015.

[2] At all material times the appellant and his co-accused were legally represented. The appellant had an automatic right of appeal, being sentenced to life imprisonment in terms of the Criminal Law Amendment Act. The appellant sought condonation for the late filing of the Notice of Appeal and same was not opposed by the respondent. The explanation provided in respect of the delay was reasonable. Both parties argued the appeal.

[3] The appellant raised various grounds of appeal as contained in the notice of appeal[2]. In essence the appellant highlighted several irregularities pertaining to the procedural, as well as the factual findings made by the court a *quo*.

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[1] *Act 105 of 1997 as amended*
[2] *See Vol 1pages 2 to 4 of the notice of appeal.*

[3.1] The appellant highlighted that the court a *quo* erred in finding that the state proved its case beyond a reasonable doubt in the evaluation of the evidence.

[3.2] The Court a *quo* erred in finding that both the appellant and co-accused killed the deceased, when the Doctor who conducted the post-mortem examination, conceded that the deceased could have died due to natural causes.

[3.3] The Court a *quo* erred in finding that the pointing out by the appellant, was done freely and voluntary.

[3.4] The court a *quo* erred in overlooking the material contradictions from the state witnesses namely Warrant Officer Pila interviewing the appellant whilst Colonel Lawrence, testified that he interviewed the appellant.

[3.5] It further erred in not finding that the appellant was given photos which were not clearly visible, and not finding the version of the appellant to be reasonably true under the circumstances.

[3.6] Further, that the court a *quo* erred in finding that the state proved its case beyond a reasonable doubt.

[4] The appellant sought that the appeal court consider the evidence afresh and find that the conviction by the court a *quo,* be set aside as the state failed to prove his guilt beyond reasonable doubt.

[5] In respect of sentence the appellant indicated that the court a *quo erred* by imposing life imprisonment, and not finding that substantial and compelling circumstances existed when dealing with the mitigating factors of the appellant, which taken cumulatively, constituted substantial and compelling circumstances. The appellant sought that this court consider sentence afresh and impose a sentence that is just and equitable.

[6] In **S v Jaipal**[3] the Constitutional Court stated as follows in respect of the right to a fair trial:

> *25. Section 35(3) of the Constitution states that every accused person has a right to a fair trial. The basic requirement that a trial must be fair is central to any civilized criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness. The importance and universality of the right to a fair trial is evident from the fact that it is recognized in key international human rights instruments. It is a trite principle that the findings of fact of the trial court, are presumed to be correct unless there are demonstrable and material misdirection on its part. Those findings will only be disregarded if the recorded evidence shows them to be clearly wrong. In the same vein, the credibility findings of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong*[4].

[7] This court noted that the appeal record was incomplete, but the transcribed record before us was sufficient to consider the appeal, on the papers. The state

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[3] (CCT21/04) [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) (18 February 2005)

[4] see S v Hadebe & others 1998 (1) SACR 422 (SCA) p 645E - 6461

led evidence of the witnesses in respect of the incident, the "trial within a trial" and handed in Exhibits "A" to "O" as proof in support of the allegations made, in respect of the involvement of the appellant and his co-accused, in the commission of the offence.

BRIEF BACKGROUND:

[8] On the 26 December 2012, the deceased was last seen by her mother during the day, never to be seen alive again. Her mother testified that her child did not return home, and she became concerned and reported to the police and made enquiries from friends and family. She even approached the newspapers to request assistance to trace her. She knew the appellant's co-accused as she would see her passing the house, on her way to school. After the deceased went missing, the co-accused came to her home, looking for the deceased and informed her mother, that she last saw the deceased boarding a Mini Cooper motor vehicle in Ga-Thoka. The deceased had informed the co-accused that the people in the vehicle were her relatives and were speaking in the same language as the mother of the deceased. She saw the co-accused again the day the police came and informed her that they had found the remains of the deceased in Ga-Thoka. She accompanied the police to the location where the deceased was found. Her evidence was not tested under cross examination.

[9] The post-mortem report indicated that no specific anatomical cause of death could be ascertained due to the extent of the decomposition. However, death due to unspecified unnatural causes, could not be ruled out. The forensic pathologist was unable to indicate whether the cause of death was

strangulation or otherwise. The identity of the body was verified to be the deceased through the process of DNA.

[10] Ms Makwela the teacher at the school where the co-accused attended, testified that on 25 January 2013, she interacted with the co-accused, who had information concerning the circumstances in respect of the deceased's death. The School Principal and the co-accused's mother were contacted and thereafter the police. The co-accused indicated that the appellant was her boyfriend and subsequently, pointed him out to the police, who detained him in respect of the allegations made by his co-accused. The matter was initially investigated on the premise that the co- accused feared for her life, that she would be physically harmed by the appellant. It later transpired that this was not the case, and she was subsequently arrested and detained. The co-accused made a confession to Magistrate Baloyi concerning her involvement in the commission of the offence.

[11] Whilst in custody, the appellant was interviewed by the police and subsequently, he took the police to the location, where the deceased's remains were found. It is these circumstances leading up to the pointing out by the appellant and subsequent conviction based on this evidence that is in issue before this court.

[12] The court a *quo* held a "trial within a trial" specifically to address the admissibility of the evidence obtained implicating the appellant and his co-accused. In respect of the appellant, the relevant evidence was that of Captain Ngobeni,

Sergeant Mogale (the photographer), Warrant Officer Pila, Captain Baloyi and Lieutenant Colonel Laurens. From the onset it was apparent that the court a *quo* was concerned with finalizing the matter urgently and this could possibly have resulted in various procedural irregularities which could not be overlooked by this court. Specific consideration was given to the proceeding of the "trial within a trial" and what followed thereafter which was of concern. From a reading of the record, it was apparent that all the parties appearing were inexperienced and unfamiliar with evidence in terms of section 217, 218 and 219 of the Criminal Procedure Act.[5] The respondent at no stage prior to the "trial within a trial", placed on record what was in dispute in respect of the pointing out. The appellant's legal representative also did not indicate what exactly was disputed concerning this document. This resulted with the court a *quo* asking various questions of Captain Ngobeni[6]

[13] In **S v Rudman and Another; S v Mthwana**[7] the Appellate Division, highlighting the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire:

> *'Whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'. At page 377 it was said that, "A Court of appeal does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice",*

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[5] *Act 51 of 1977*

[6] *See page 46 line 20 to page 47 line 10 also pg 48 line 8 to pg 49 line 21.*

[7] *1992 (1) SA 343 (A)*

or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'

[14] The Constitutional Court in **S v Dzukuda and Others; S v Tshilo**[8] noted the following in respect of fair trial rights;

> *"It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution.*[9] *An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the*

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[8] *(CCT23/00) [2000] ZACC 16; 2000 (4) SA 1078 ; 2000 (11) BCLR 1252 (CC) (27 September 2000)*
[9] *See, amongst others, sections 1(a), 7(1), 36(1) and 39(1)(a) of the Constitution.*

basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality[10].

[15] From the start of the proceedings the presiding Judge appeared to be interjecting, disrupting the appellant and respondent from a smooth flowing trial.[11] During the cross-examination of Captain Ngobeni, it was established that he had not completed the pointing out form but rather another officer had done so[12]. This evidence was not ventilated concerning who completed this form and this oversight on the part of all the role players had an impact, on the evidence tendered to the detriment of the appellants right to a fair trial.

[16] The court a *quo* deemed it necessary to provide answers on behalf of the witnesses, to questions posed during cross examination.[13] It was during the

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[10] *In his instructive work Due Process and Fair Procedures (Clarendon Press, Oxford 1996), DJ Galligan points out (at 9-24) how the concept of appropriate procedures has moved away from Bentham's view "that the object of procedures at the criminal trial is to produce an accurate outcome" (at 9-10), because of the "utility in the social stability which follows from the accurate and regular application of the laws..."(at 8-10), towards one that combines accuracy of outcome with procedural fairness. While "legal processes serve social ends and goods, they do so through a distinct, normative, legal structure" (at 13), which in turn is "based on the tiers of values relevant to that process which constitute the standards of fair treatment, so that a person treated in accordance with them is treated fairly" (at 52). The learned author also observes that "procedures are fair or unfair only by reference to standards of fairness, and standards of fairness are in turn based on values" (at 55). In relation to the controversy over whether the adversarial nature of the trial at common law is to be preferred to the more inquisitorial procedures of continental Europe, Galligan says the following:*
"Each may be as effective as the other in leading to fair treatment, that is, in reaching correct outcomes and in maintaining respect for other values; there is no evidence, moreover, to show that one is better than the other in adhering to those ends. The real debate in comparing the two approaches is not about which will lead to more correct outcomes, but rather what values are relevant, with one tradition regarding an equal contest and the autonomy of the parties as important, the other emphasizing the importance of centralized control and unrestricted investigation by the magistrate and judge. The real difference, in other words, between the two traditions is what standards of fair treatment should govern the trial process; and because different answers are given to that question within each tradition, the procedures within them will also naturally vary" (at 62-3).

[11] See page 57 line 12 to page 58 line 15.

[12] *See pg 57 line 10 of the witness evidence*

[13] *See page 101 line 5 to line 15; Page 117 line 16; page 119 line 1,line 10, line 14, page 122 line 13 to line 24. Page 135 line 23, page 136 line 14 to page 137 line 2. Page 138 line 16 . page 144 line 9 to line 25. Page 161 line 18. Page 207 line 7.page 215 line 4, page 216 line 25, page 240 line 12.page 241 line 21 and 24. Page 344 line 9. Page 367 line 23, page 386 line 18, page 387 line 18,page 407 line 20, page 437 line 15, page 441 line 10, page 468 line 2 and line 4,page 479 line 17, page 494 line 23,page 495 line 1, page512 line 6,*

discussion, that it appeared that the presiding Judge limited cross examination, which would have been relevant to be able to properly defend the appellant[14]. The court a *quo* expressed the urgency to finalize the trial at all costs[15]. During the proceedings inadmissible hearsay evidence was accepted as part of the record as admissible.[16] The court a *quo* made negative comments on record which was unfortunate and did not bode well with this court.[17] From the record it was apparent that the presiding Judge descended into the arena. The question that arises, is whether or not the irregularity in the present instance, of descending into the arena, constituted a failure of justice. The test to be applied by courts has been laid down in **S v Felthun**[18], where the following was said:

> *"Generally speaking, an irregularity or illegality in the proceedings at the criminal trial occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated and conducted. The basic concept... is that an accused must be fairly tried..."*

[17] It was unfortunate that the respondent failed to place on record the fact that the pointing out document contained information concerning conversations held with the appellant. At no stage during the "trial within a trial", was this aspect

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[14] *See page 348 line 12 to page 352 line 1, page 361 line 10 to page 362 line 18, page 363 line 7 to line 11, page 369 line 15 to page 372 line 1,page 374 line 4 to page 376 line 21, page 384 line 3 to page 386 line 12, page 393 line 21 to page 395 line 20,page 414 line 9 to page 415 line 19, page 419 line 12, page 419line 21, page 425 line 1 to line 18,page 498 line 7 to line 12,page 499 line 2 line 10, page 502 line 12, page 510 line 10 to line 16*

[15] *See page 150 line 12 to line 18, page 391 line 12,*

[16] *See page 155 to 159.page 172, page 187, page 400 to 403, page 405, page 408, page 409, page 410, page 412, page 466 line 10 to page 467 line 7,*

[17] *See pages 196 line 3 to line 20, page 383 line 11 reference here is contemptuous of the lower court title "your worship", page 416 line 14 to page 417 line9, page 486 line 17, page 487 line 6 to line 20. Page 505 line 22 to 25, page 522 line 7.*

[18] *1991 (1) SACR 481 (SCA) at 485h-486b*

canvassed and ventilated with specific reference to the contents of the document. This was crucial information that would have needed to be identified, in respect of whether it qualified as an admission or a confession, prior to the reading of the contents into the record, during the main trial. The role players did not actively participate in the "trial within a trial" proceedings, and the trial Judge failed to stop the main trial proceedings and investigate the admissibility of this evidence. It must be borne in mind that a Judge is more than a mere umpire.

[18] An admission or confession is proved admissible by way of a "trial within a trial", the requirements for each vary, and the basis needed to be laid, during those proceedings, where each side leads evidence, and then argues on the admissibility, if this information qualified, to be an admission or confession. It was improper to read this document on record without ventilation of the contents. The acceptance of this document, including its contents were not ventilated in the "trial within a trial", which was where the requirements and admissibility for this document, to be received as an exhibit, would have been addressed. These issues were not even canvassed and argued by the appellant's legal representative, who was aware of the contents, of this pointing out form and who was obliged to actively protect the appellant's interest in respect of same.

[19] These irregularities cannot be overlooked or brushed away and goes to the heart of the appellant's right to a fair trial, as protected by our Constitution. In

our view, given the facts and circumstances highlighted above, it is imperative that this Court intervenes. This court is empowered to interfere in exceptional circumstances and where the interests of justice call out for its intervention. This case warrants such intervention. This court appreciates the seriousness of the offence, but to be blind to the various irregularities, would not be in the interest of justice, and the role of this court must always be to see that justice is not only done, but seen to be done, which did not occur in this case.

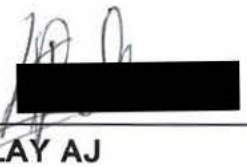
[20] In the judgment by the court a *quo* very little or no mention was made concerning the inadmissible evidence that presented itself at the trial, and how same was dealt with. This made the findings of the court a *quo* unclear as to which evidence was relied upon, in respect of the conviction of the appellant. **Section 35(5) of the Constitution** makes provision that unconstitutionally obtained evidence amidst being obtained in terms of **section 218 of the Criminal Procedure Act,** may be excluded, if same could be identified as unfair, or likely to bring the administration of justice into disrepute. This was also not canvassed or ventilated during judgment and as such this court is not convinced that the conviction of the appellant, was in accordance with justice. Therefore, the conviction and sentence of the appellant, must be set aside on appeal.

[21] In the result the following order is made

[21.1] The Appeal in respect of the conviction and sentence is upheld.

[21.2] The conviction and sentence of the appellant is set aside.

[21.3] The case is referred to the DPP for consideration and possible trial *de nova*, before a different presiding officer.

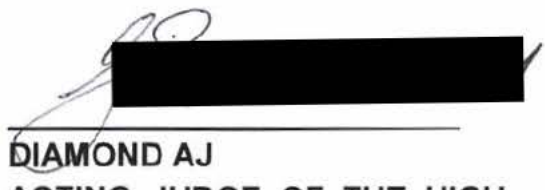


PILLAY AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I, concur, and it is so ordered

NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I, concur,



DIAMOND AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION

APPEARANCES:

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Instructed by:	**Legal Aid South Africa**
Counsel for the Respondent:	**Adv E.S.J MUFAMADI**
Instructed by:	**DPP Polokwane**
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