IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Court Case no: AR362/22

High Court Case no: CCD12/2017

In the matter between:

SIPHAMANDLA INNOCENT SANGWENI	**FIRST APPELLANT** [accused 1 in the court a quo]
PHILANI XOLANI KHAMBULE	**SECOND APPELLANT** [accused 2 in the court a quo]

and

THE STATE	**RESPONDENT**

ORDER

On appeal from: the KwaZulu-Natal Local Division of the High Court, Durban (Nkosi AJ sitting as court of first instance):

1. The appellants appeal against their convictions and sentences succeed.
2. The convictions and sentences of the first and second appellants are set aside.

JUDGMENT

Mathenjwa J (Steyn J and Tucker AJ concurring):

Introduction

[1] The appellants were convicted in this Division on one count of murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997(the Act), one count of attempted murder and two counts of robbery with aggravating circumstances read with s 51(2) of the Act. The trial court took the two counts of robbery with aggravating circumstances together for purposes of sentence. In respect of the count of murder the appellants were sentenced to life imprisonment, in respect of the count of attempted murder they were sentenced to eight years imprisonment and in respect of the two counts of robbery with aggravating circumstances they were sentenced to 15 years imprisonment. All sentences were ordered to run concurrently with the sentence of life imprisonment. The appellants appeal against their convictions and sentences with leave that was granted by the trial court.

The grounds for appeal

[2] In summary, the grounds of appeal raised by the appellants were that:

(a) The court a quo erred in finding that the statements made by both appellants to Colonel Sibiya and Captain Gounden respectively were freely and voluntarily made**.**

(b) In particular the court a quo ought to have found that the statement made to Captain Gounden was inadmissible on the grounds that Captain Gounden was working at the same police station with the investigating officer and had previously participated by conducting an identification parade in the same case.

(c) The court a quo erred in taking judicial notice of the signature in the first appellant’s statement and drew a conclusion that the signature on the statement was that of the appellant

(d) In assessing the evidence of Mr Khumalo, who was an accomplice, the court a quo erred in not applying the cautionary rule.

(e) The court a quo erred in finding that the evidence of Mr Khumalo was further corroborated by the evidence of Mrs Naidoo, as well as by the statements made by the appellants.

(f) The court a quo erred in finding that the dock identification of the first appellant by Mrs Naidoo was credible and reliable.

Trial in the court a quo

[3] During the trial in the court a quo both appellants contended that they were not advised of their constitutional rights from the moment of their arrest until they allegedly made statements to the commissioned officers of the South African Police Services. They alleged that the statements were not freely and voluntarily made, and that they were threatened to make such statements. The first appellant alleged that he was given a document and told where to sign on it by Colonel Sibiya who took the statement from him. He in fact disputed that he made any statement to Colonel Sibiya and further denied that the signature on the statement was his. The second appellant alleged that he was threatened by the investigating officer, Sergeant Ngcobo, to make the statement in order to get bail and furthermore, Sergeant Ngcobo told him what to state in the statement.

[4] A substantial part of the State's evidence was given by Mr Phakamani Nkosikhona Nsele, who testified that he was present at Ntshaweni area when the appellants and other persons planned to commit the offences they were convicted of at Gledhow. He remained behind and did not go with them when they left to commit the offences. Mrs Naidoo was the complainant in the attempted murder charge and an eye witness to the charge of murder of the deceased. She testified that the first and second appellants entered into the liquor shop and one of them shot her and the deceased with a fire arm. She later attended an identification parade where she identified a wrong person whom she mistook for the first appellant. Furthermore, it is common cause that she failed to identify the second appellant who was present at the identification parade. In court she identified the first appellant in the dock as one of the assailants, but again failed to identify the second appellant who was also in the dock.

[5] Mr Lucky Thulani Khumalo was an accomplice who testified in terms of s 204 of the Criminal Procedure Act 51 of 1977 (CPA). Mr Khumalo testified that he was recruited by Mr Nsele to join the appellants and other persons who were waiting by the roadside at Ntshaweni area. He was further invited by the first appellant to board a vehicle which they used to commit the offences. The appellants and other persons

did not tell him where they were going to nor what they were going to do. Upon their arrival at Gledhow the second appellant ordered the first appellant and another person to enter into the liquor store while he and the second appellant entered into the minimarket. At that stage he noted that the first and second appellants were carrying firearms. He then realized that they were about to commit a robbery, but the second appellant told him not to ask any questions. The second appellant pointed a firearm at the owner of the minimarket. He and the second appellant stole money and cigarettes from the minimarket which they later shared among themselves.

[6] The State advised the court of its intention to use the statements made by the appellants to the commissioned officers as evidence against them. The appellants contended that these statements were inadmissible. Subsequently, a trial within a trial was held to determine the admissibility of the statements. At the end of the trial within a trial the court a quo found that the statements had been freely and voluntarily made by the appellants. The main trial proceeded and at the end of the main trial the court a quo found that the State had proved its case against the appellants beyond a reasonable doubt. However, the court a quo did not make a finding on whether the appellants were advised of their constitutional rights. The first appellant was convicted based on the evidence of Mrs Naidoo, Mr Khumalo and the statement he made to the commissioned officer, while the second appellant was convicted solely on the basis of the evidence of Mr Khumalo and the statement he made to the commissioned officer. Regarding the evidence of Mr Nsele, the trial court found that he was not an impressive witness; he did not answer questions frankly and honestly and he was evasive. Thus, Mr Nsele's evidence based on the credibility findings that were made by the court a quo could not be used in support of the state's case.

Issues in this court

[7] The issues for determination in this appeal are the admissibility of the confessions made by the appellants to the commissioned officers and whether the court a quo was misdirected on either law or fact in convicting the appellants based on the statements made to the police offers and evidence of an accomplice who is also a single witness in respect of the second appellant.

[8] In argument before us it was submitted on behalf of the first appellant that if the court a quo had carefully considered the questions and answers provided by the first appellant in the written confession then it would not have concluded that the statement was freely and voluntarily made by the appellant. Furthermore it was contended that the court a quo erred in taking judicial notice of a fact that ought not to have been accepted as fact by the court, that is the signature of the appellant. In addition it was argued that because Mrs Naidoo had earlier identified the wrong person at the identification parade instead of the first appellant, the trial court should not have relied on Mrs Naidoo's dock identification of the first appellant.

[9] It was submitted on behalf of the second appellant that the court a quo erred in convicting the second appellant solely on the basis of the statement made by him to Captain Gounden and the evidence of Mr Khumalo, which was uncorroborated and unsatisfactory.

[10] The counsel for the respondent conceded in argument that the statements made by both appellants were not admissible in law and that the evidence of both Mr Khumalo and Mrs Naidoo were not satisfactory nor credible. The concession by the State's counsel was well made for the reasons that will appear later in this judgment.

The law

[11] Confessions are governed by s 217 of the CPA which provides that:

'(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: Provided-

(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice.

(b) that where the confession is made to a magistrate and reduced to writing by him, or is conferred and reduced to writing in the presence of a magistrate, the confession shall upon the mere production thereof at the proceedings in question-

(i) …

(ii) be presumed, unless the contrary 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, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto'.

It is trite that the onus rests on the State to prove that the confession was freely and voluntarily made, and was not unduly influenced.[1] The requirement of freely and voluntarily made have been defined to mean that the confession must not have been induced by violence or threats or promises made by a person in authority.[2] With the advent of the new constitutional regime, the rights of the arrested, detained, and accused persons outlined in s 35 of the Constitution are closely connected to the admissibility of confessions. Some of the most relevant aspects of the rights are; the right to remain silent,[3] right not to be compelled to make any confession or admission that could be used in evidence against that person,[4] and the right to choose, and to consult with, a legal practitioner, and to be informed of this right promptly.[5] The importance of these rights during the pre-trial procedures was emphasised in *S v Melani and others*,[6] where it was stated that:

'The right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions.'[7]

[12] This court is satisfied that Colonel Sibiya and Captain Gounden are commissioned officers of South African Police Services, and therefore entitled to take confessions.[8] Confessions made to police officers have received judicial attention. Courts have called upon judicial officers to be vigilant where the State relies, for conviction of an accused, solely on a statement in the form of a

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[1] *S v Zuma and others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) para 3.
[2] Ibid para3.
[3] Section 35(1)*(a)* of the Constitution.
[4] Section 35(1)*(c)* of the Constitution.
[5] Section 35(2)*(b)* of the Constitution.
[6] *S v Melani and others* 1996 (1) SACR 335 (C).
[7] Ibid at 347e.
[8] Section 4 of the Justices of the Peace and Commissions of Oath Act 16 of 1963; *Gama v S* [2013] ZASCA 132 para 8.

confession. In *S v Latha and another*[9] the Supreme Court of Appeal criticised the practice of taking confessions by a police officer attached to the same unit as the investigating team. In *Latha* Grosskopf JA stated as follows:

'This Court has held in a number of cases that although it would not be irregular for a police officer attached to the particular unit which investigated the matter to take a confession, it would be preferable in such a case to take the suspect to a magistrate or a police officer who was a member of another unit.'[10]

The court held that the reason was not to impugn the integrity of the police officers but to allay suspicion by the suspect who may perceive the police officer to be part of the investigating team. In S *v Gcam-Gcam*[11] the Supreme Court of Appeal further called upon judicial officers to be vigilant when determining the admissibility of a confession made to a police officer, even if that officer was not attached to the same investigating team. Cachalia JA stated as follows:

'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.'[12]

[13] In *Mchunu and another v S*[13] a full court of this Division considered a confession that was made to a police officer who was attached to the same unit as the investigating team. Further, the court was critical of the practice of taking of confessions by police officers in general even if the officers were not attached to the same unit as the investigating team. In *Mchunu* Steyn J stated as follows:

'Lastly, it deserves mention that it is regrettable and unfortunate that the amendment to s 217(1)*(a)* has not as yet come into operation, because if it had, it would have impacted upon the conduct of the officers investigating this case. The amendment, in all likelihood, would have resulted in a procedure that aids and supports due process by not allowing police officials, albeit commissioned officers, to take any confessions.'[14] (footnotes omitted)

Analysis

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[9] *S v Latha and another* 1994 (1) SACR 447 (A).
[10] Ibid at 449G.
[11] *S v Gcam-Gcam* 2015 (2) SACR 501 (SCA).
[12] Ibid para 49.
[13] *Mchunu and another v S* [2024] ZAKZPHC 92 (*Mchunu*).
[14] Ibid para 28.

[14] In the light of the appellants' contention in the court a quo that they were not advised of their constitutional rights from the moment they were arrested, the court a quo ought to have made a finding of the facts on whether the appellants were informed of their constitutional rights or not. The purpose and importance of informing the arrested persons of their constitutional rights was stated in *S v Magwaza*.[15] In *Magwaza* the Supreme Court of Appeal stated as follows:

'The purpose of making a suspect aware of his rights is so that he may make a decision whether to exercise them, and plainly he cannot do that if he does not understand what those rights are.'[16]

I am mindful of the fact that not every irregularity constitutes a failure of justice and infringement of a right to fair trial.[17] However, a failure to inform arrested persons of their constitutional rights has the effect of depriving them of their right to remain silent,[18] which is an important aspect of the right to a fair trial. In the event the accused person was able to demonstrate that the failure by the investigating officer and subsequently the commissioned officer to inform them of their rights had materially prejudiced them and infringed their rights to remain silent that would have constituted infringement of their right to a fair trial.

[15] In establishing admissibility of a confession, the starting point is to determine whether the requirements of s 217 of CPA was satisfied. The questions and answers recorded in the document in which the confessions are contained should shed light on whether the requirements of the provisions of s 217 were complied with.[19] The recording of the confessions of both appellants which were admitted in evidence as exhibit G1 and G2 respectively reflect vague, incoherent and contradictory answers to the questions in the confession's pro forma forms. I start with exhibit G1, a record of the questions put by Colonel Sibiya to the first appellant and the first appellant's answers thereto. In paragraph 7 the statement provides that:

'You are not obliged to say anything to me. You are further warned that whatever you may say will be noted down and may be used as evidence against you in a subsequent trial. Do you understand?'

The answer to this question is 'yes'. Paragraph 8 provides that:

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[15] *S v Magwaza* [2015] ZASCA 36; 2016 (1) SACR 53 (SCA).
[16] Ibid para 17.
[17] *S v Joubert* [2017] ZASCA 3; 2017 (1) SACR 497 (SCA) para 8.
[18] *Mchunu* para 11.
[19] *S v Mpetha and others* 1982 (2) SA 406 (C) at 408E-H.

'You have the right to remain silent (also explain to the declarant the consequences if he elects to make a statement)'.

There is no provision for the appellant's response to this statement in the pro forma form. Paragraph 9 provides that:

'You are not obliged to make any confession, admission or statement that might be used against you in subsequent trial. Do you understand?'

The answer provided is 'yes'. Paragraph 10 provides that:

'You have the right to consult, before the making of the statement, with a legal representative of your choice, and if you cannot afford the services of such legal representative, a legal representative can be appointed for you who is not in the employment of the state and whose services will be provided at no cost to yourself. Do you understand these rights?'

The answer is 'yes'.

[16] It is apparent in paragraphs 7 to 10 of the pro forma form that the statements stipulate the appellant's rights, they do not make provision for the appellant to respond to the statements. The absence of such provision for the first appellant to respond on whether he wanted to exercise the rights or not, is more probable with his contention that he was not informed of the rights. The first appellant could not have made a choice to exercise these rights if he was not given the option to do so.

[17] Paragraph 16 of the pro forma form provides that:

'Do you have any injuries, bruises, wounds or scars on your body of any nature whatsoever?'

The answer is 'no injuries, bruises, wounds.' Paragraph 16.1 states:

'If so, can you show them to me, please?'

The answer is

'a scar noted on the right hand. Suspect indicated that he got injured at work not sure about year about 2011'.

Paragraph 18 sates:

'Have you been encouraged by any person to make a statement? If so, by whom and how?'

The answer is 'not applicable'. Paragraph 19 states:

'Have you been influenced in any way by any person to make the statement? If so, by whom and how?'

The answer is 'not applicable'. Paragraph 20 states,

‘Have you received or do you expect any benefit(s) if you make the statement? If so, what benefit(s)?’

The answer is ‘not applicable’. Section E, paragraph 3 states:

‘Do you have any complaints about the manner in which I have recorded the statement?’

The answer is ‘yes’. The question on whether the first appellant was satisfied with the interpreter was recorded as ‘not applicable’.

[18] In my view, if the court a quo had cautiously considered the questions and answers in the statement it would not have arrived at the conclusion that the statement was made free and voluntarily in the first appellant’s sober senses. The contradictions in the pro forma form demonstrates that the first appellant did not comprehend the questions and answers, as evidenced by the pro forma form's statement that the appellant had no injuries and his subsequent display of a scar to the commissioned officer. Furthermore, the questions in paragraphs 18, 19 and 20, which elicited answers from the appellant on whether he was encouraged or had been influenced by any person to make the statement and whether he had received or expected any benefits if he made the statement, are determinative on whether the statements were made free and voluntarily. It’s apparent that the police officer did not ask these questions to the appellant because he said the answers to these questions were not applicable. Furthermore, the pro forma form's recorded responses show that the appellant was unhappy with how the statement was obtained from him. Colonel Sibiya, during cross examination in the trial within a trial, said that the ‘yes answer’ given by the first appellant to the question in this regard was recorded by mistake on his part. In my view if Colonel Sibiya had read the statement to the appellant as he contended to have done, he would have picked up this error and rectified it.

[19] In my view, the use of the same police officer, who took the statement as an interpreter, casts doubt on whether the questions and answers, and subsequently the entire statement, was interpreted to the appellant. It is not in dispute that both Colonel Sibiya and the first appellant were isiZulu speaking persons; the questions and answers in the pro forma form are written in English; Colonel Sibiya allegedly interpreted the answers and questions to the appellant in isiZulu and recorded them

in English. Given the contradictory answers to the questions in pro forma form, coupled with the fact that the appellant was not asked whether he was satisfied with the interpretation, it's reasonable to conclude that the conversation between the appellant and the commissioned officer was either not interpreted at all or was poorly interpreted. A confession has far reaching consequences to end the liberty of an accused person in that an accused may be convicted on the strength of a confession and sentenced to life imprisonment. For that reason the administering of a confession should comply with the prescripts set out in s 35 of the Constitution, which requires an accused person to be tried in a language that he or she understands or, if that is not practicable, to have the proceedings interpreted in that language.[20] It is now settled that the right to silence begins at the inception of the criminal process, ie when the person is arrested.[21] Considering the consequences a confession has on the liberty of an accused person the arrested individual should have the right to be interviewed in a language they can understand at the time of the confession.

[20] It is not in dispute that many accused persons who come to the criminal justice system are hindered from fully participating in the process from the moment they are arrested throughout the trial due to their limited or having no proficiency in the language used in the court.[22] A fair criminal justice system trial requires that the accused understands the language used when he or she makes a confession.[23] The importance of a professional interpreter is that he or she overcomes the language barriers and ensure that persons who come to the criminal justice system enjoy equal access to justice. Considering that the confession should not only be made freely and voluntarily, and should only be made by an accused in his or her sober senses, the accused should fully understand the questions posed to him or her and the answers provided should demonstrate a full understating of the questions. Thus, the absence of an interpreter may be prejudicial to the accused person such that it may lead to a failure of justice.

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[20] Section 35(3)*(k)* of the Constitution.
[21] *S v Sebejan* 1997 (1) SACR 626 (W) at 635d.
[22] SJ Lebese 'Do justice to court interpreters in South Africa' (2014) 43 *Stellenbosch Papers in Linguistics Plus* 183 at 183-184.
[23] Ibid.

[21] The court a quo was misdirected when it took judicial notice of the first appellant's hand writing specimen and drew a conclusion that the signature on the statement was that of the appellant. The doctrine of judicial notice allows a judicial officer to accept certain facts as correct without the need to lead evidence to prove those facts.[24] Judicial notice can be taken of facts

'so notorious as not to be the subject of reasonable dispute (for instance, the date of Christmas), or which are capable of immediate and accurate demonstration by resort to sources of indisputable accuracy (such as the date of Easter in a particular year).'[25]

Facts are notorious if they are reasonably known among reasonable informed and educated people and not the result of observation.[26] Thus courts are not competent to take judicial notice of a handwriting specimen, an issue that falls within an area of expertise, which is neither notorious nor readily ascertainable.

[22] This then brings me to the second appellant's confession. Section A, paragraph 4 of the pro forma form of the statement made by the second appellant to Captain Gounden states:

'Why do you want to make the statement'.

The answer is, 'I want to apply for bail and tell the truth'. In paragraph 20 the question is:

'Have you received or do you expect any benefits if you make the statement? If so what benefits?'

The answer is

'I decided to make this statement on my own so that there is a chance of getting bail'.

During the cross examination of Captain Gounden in a trial within a trial he stated that the second appellant indicated to him that he decided to make the statement on his own so that there will be chances of him getting bail. In my view, the second appellant's purpose for making the statement, confirmed by Captain Gounden is more probable with his contention that he was promised by the investigating officer to make the statement in order to get bail.

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[24] M McGregor 'Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces' (2011) 44(1) *De Jure* 111 at 122.
[25] DT Zeffertt, AP Paizes and JS Grant *Essential Evidence* 2ed (2020) at 299.
[26] McGregor's article cited above at 122.

[23] The trial court erred in ruling that the statement by the second appellant to Captain Gounden was admissible. What was overlooked in my view was that Captain Gounden was attached to the same police station moreover he was part of the investigating team, had also participated in the same case by conducting an identification parade. Although Captain Gounden contended at the trial within a trial that when he took the statement from the appellant he was not aware that it was the same case in which he had conducted the identification parade, the court a quo ought to have considered that Captain Gounden's previous participation in the same case had compromised his impartiality and independence and therefore disallowed the confession as admissible evidence before it. For the aforesaid reasons the court a quo ought to have found that both confessions were inadmissible.

[24] What remains is the evidence of Mrs Naidoo and Mr Khumalo. It is trite that this court as a court of appeal cannot interfere with the credibility findings and evaluation of the oral evidence of the court a quo unless there is a material misdirection.[27] The trial court relied on the dock identification of Mrs Naidoo in respect of the first appellant and found that she was candid and honest in her evidence although she was mistaken and confused about some of the facts. It is trite that because of the fallibility of human observation courts are required to exercise caution when dealing with evidence of identification. LAWSA states this as follows:[28]

'Judicial experience has shown that evidence of identity should, particularly in criminal cases, be treated with great care. Even an honest witness is capable of identifying the wrong person with confidence. Consequently, the witness should be thoroughly examined about the factors influencing his or her identification, such as the build, features, colouring and clothing of the person identified.' (footnotes omitted)

[25] A witness might be candid and honest in his or her evidence, however, because of the potential risks of mistaken identity the courts are required to do a thorough assessment of the reliability and credibility of his or her evidence.[29] It is trite that a witnesses' identification of an accused in the dock is in principle not excluded

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[27] *S v Monyane and others* [2006] ZASCA 113; 2008 (1) SACR 543 (SCA) para 15 and *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 705-706.

[28] LAWSA, volume 18, para 263; quoted with approval by the minority in *Ndimande v The State* [2019] ZASCA 132 para 11.

[29] *Nkomo and others v The State* [2024] ZASCA 61 para 17.

solely on the basis of it having been done in court.[30] However, a critical and cautious analysis of Mrs Naidoo's evidence ought to have resulted in a finding that her dock identification of the first appellant was not credible and reliable. The reason being that Mrs Naidoo had attended an identification parade where she had identified a wrong person instead of the first appellant. Thus, the trial court had two contradicting versions of Mrs Naidoo's identification of the first appellant, first at the identification parade and secondly in the dock.

[26] Mr Khumalo is an accomplice and a single witness in respect of the second appellant. It is trite law that an accused may be convicted of an offence on the single evidence of any competent witness[31] if such evidence is clear and satisfactory in every material respect.[32] A critical analysis of both the evidence of Mrs Naidoo and Mr Khumalo shows that they do not corroborate each other. This is evident from the court a quo's finding that Mrs Naidoo's evidence stating that the deceased was shot twice in the head was incorrect; that the second appellant was present during the robbery, murder and attempted murder in the liquor store was incorrect and that she was mistaken and confused about some of the facts. That observation equally applies to Mr Khumalo's evidence.

[27] In my view, the court a quo erred in relying to the evidence of Mr Khumalo, an accomplice, after it had found that his evidence was not satisfactory in certain aspects and alluded to the improbabilities of his evidence in general, in particular his contention that he joined the appellants and travelled in a vehicle with them from Ntshaweni to Gledhow, without knowing what they were going to do at the destination. It is trite that it is not necessarily expected of an accomplice before his or her evidence can be accepted to be wholly consistent, wholly reliable or even truthful in all that he or she says.[33] However, where an accomplice who is also a single witness has been found by the court to be not satisfactory in some respect, as in this case, there would be no safe guard from convicting wrong people solely on the uncorroborated evidence of an accomplice. Although the court a quo mentioned the

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[30] *S v Matwa* 2002 (2) SACR 350 (E).
[31] Section 208 of Criminal Procedure Act 51 of 1977.
[32] *R v Mokoena* 1932 OPD 79 at 80.
[33] *S v Francis* 1991 (1) SACR 198 (A) at 205.

cautionary rule in respect of the evidence of Mr Khumalo, it failed to apply it in the judgment.

[28] Another reason as to why the court a quo relied on Mr Khumalo's evidence was based on its finding that Mr Khumalo's evidence was corroborated by the confessions made by the appellants. In this regard the court held that the confessions by both appellants and Mr Khumalo's evidence serve as safeguards against a wrong conviction. Given the finding that the confessions were inadmissible evidence, what remains is Mr Khumalo's evidence, which now remains uncorroborated and unsatisfactory. Since there is no evidence to sustain the convictions of the appellant, I need not deal with the challenges to sentences and the appeal on both convictions and sentence should succeed.

Order

[29] In the result I would make the following order:

1. The appellants appeal against their convictions and sentences succeed.
2. The convictions and sentence of the first and second appellants are set aside.

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Mathenjwa J

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Steyn J

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Tucker AJ

Date of hearing: 29 November 2024

Date of Judgment: 31 January 2025

Appearances:

Counsel for the first appellant: Mr. P Daniso

Instructed by: Legal Aid South Africa

Counsel for the second appellant: Mr. Chiliza

Instructed by: Legal Aid South Africa

Counsel for the State: Ms N Tokwana

Instructed by: Director of Public Prosecutions