THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 768/2015

In the matter between:

MARCUS NNDATENI MULAUDZI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Mulaudzi v The State* (768/2015) [2016] ZASCA 70 (20 May 2016)
Coram:	Theron, Petse and Willis JJA
Heard:	5 May 2016
Delivered:	20 May 2016

Summary: Criminal Law – whether the State proved beyond a reasonable doubt that appellant was guilty of murder and robbery where the only material evidence was that of an accomplice, a single witness found to be untruthful and whose evidence was not corroborated.

ORDER

On appeal from: Limpopo Local Division of the High Court, Thohoyandou (Makgoba AJ sitting as court of first instance):

The following order was made on 5 May 2016:

1 The appeal is upheld. The convictions and related sentences are set aside.

2 Reasons for this order will be furnished later.

JUDGMENT

Petse JA (Theron and Willis JJA concurring):

[1] The appellant, Mr Marcus Nndateni Mulaudzi, together with three other persons who do not feature in this appeal, was charged in the Limpopo Local Division of the High Court, Thohoyandou (Makgoba AJ) on three counts, namely: (a) murder; (b) robbery with aggravating circumstances; and (c) attempted murder. On 22 August 2006 he was convicted of murder and robbery but acquitted on the count of attempted murder. He was sentenced to imprisonment for life on the murder count and ten years' imprisonment in respect of the robbery.

[2] Subsequently, he applied for leave to appeal against his conviction which application was heard by Hetisani J and refused. The appellant appeals against conviction with the leave of this court. The appeal served before us on 5 May 2016. After conclusion of argument the court made an order upholding the appeal and setting aside the conviction and the related sentences, indicating that reasons for the order would be filed later. The following are such reasons.

[3] The appellant was the third accused at the trial. His co-accused were Mr Tshimangadzo Leroy Mushweu; Mr Piet Mudzugu and Mr Samuel Ntshavheni Ndwambi who were the first, second and fourth accused, respectively. At the commencement of the trial they all pleaded not guilty to the charges. For present

purposes there is nothing material to be said concerning the second and fourth accused.

[4] The State called four witnesses to testify at the trial. None of the State witnesses gave any incriminating evidence against the appellant. According to the evidence of the principal witness, Ms Masindi Ramusetheli, the complainant in relation to count 3 (attempted murder) and the deceased's mother, she was disturbed by a commotion that occurred in the garage during the early evening of 25 July 2005. She rushed to the garage and there saw two men one of whom was the first accused. At that stage the deceased had already been shot. When she tried to intervene, she was struck twice in the head with an iron bar. She sustained injury which rendered her intervention of no avail.

[5] One of the other witnesses called by the State, Mr Tshifhiwa Herold Mushweu, testified that some time after the killing of the deceased he received a telephone call from someone, whom he did not know, who introduced himself as Marcus (being a reference to the appellant). The caller requested him to convey a message to the first accused, his brother, to come and collect a jacket that he said he had bought for the first accused.

[6] All of the accused, barring the second accused, testified in their defence. Of particular importance is the evidence of the first accused. It bears mentioning that during the State's case it tendered evidence of an extra-curial statement (termed a confession by the State) made by the first accused. Despite the first accused contesting the admissibility of this statement it was ruled admissible by the trial court.

[7] In that statement, the first accused alleged that he was party to a conspiracy involving his co-accused in terms of which it was agreed that they would rob the deceased of his money. He alleged that his role was to point out the deceased's homestead to the second and third accused whilst the fourth accused's role was to supply the firearm to be used during the robbery. The appellant drove them to the deceased's home in a Toyota Venture motor vehicle owned by the appellant's employer. The first accused said that he was an unwilling participant in this escapade but was compelled to participate for fear of reprisal at the hands of his co-

conspirators and in particular the fourth accused. He went on to allege that it was the second accused and the appellant who committed the offences with which they were charged and that the former was the one who pulled the trigger. In his testimony at the trial, the first accused in substance regurgitated the contents of his statement.

[8] When the appellant testified in his defence, he denied that he was a party both to the conspiracy and the actual execution of such conspiracy. In essence he raised an alibi and said that it would not have been possible for him to use his employer's motor vehicle to convey the perpetrators to the scene where the crimes were committed. He testified that after he had knocked off from work and parked his employer's motor vehicle at the latter's home he retired to his home.

[9] The trial court characterised the first accused's defence as one of compulsion. It went on to find that so far as the first accused sought to exculpate himself both in his extra-curial statement and *viva voce* evidence in court he was untruthful. But it then proceeded to uncritically accept his evidence that incriminated the appellant. It found that 'if accused 1 wanted to falsely implicate accused 3 (a reference to the appellant) he would have gone further to describe the degree of participation by accused 3, what he did at [deceased's] place. It is not being suggested that accused 3 at one stage pulled the trigger or used any form of weapon to attack the deceased. Accused 3's degree of participation was of grabbing deceased when either accused 1 or 2 shot at the deceased'.

[10] There are several fundamental misdirections that emerge from the judgment of the court a quo. First, it did not evaluate the evidence in its entirety. Not even a fleeting reference was made to the countervailing evidence of the appellant. Thus the conflict between the evidence of the first accused on the one hand and that of the appellant on the other hand escaped the attention of the court a quo. As Nugent J explained in *S v Van der Meyden*:[1]

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[1] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 450a-b; 1999 (2) SA 79 at 82D-E.

This dictum has been quoted with approval in several cases by this court.[2]

[11] Second, the court a quo did not at all advert to the fact that on the first accused's own version, upon which it relied entirely in convicting the appellant, the first accused was both an accomplice and a single witness. Thus it failed to exercise the caution that it was enjoined to do in evaluating his evidence. In *S v Johannes*[3] this court cited with approval a passage in Hoffman *The SA Law of Evidence* 2ed at 269 where the following is stated:

'The evidence of a co-accused given on his own behalf is, when considered against a co-accused, the evidence of an accomplice and open to all the objections which can be made to accomplice evidence. The cautionary rule for dealing with such evidence should therefore be applied.'

[12] As to the cautionary rule that courts are enjoined to apply when evaluating the evidence of an accomplice the remarks of this court in *R v Ncanana* 1948 (4) SA 399 (A) at 405 are apposite. This court said:

'The rule of practice which it was intended to state and which is consistent with, if it is not expressly approved in, decisions of this Court (see *R v Kubuse* (1945 AD 189); *R v Brewis* (1945 AD 261); *R v Kristusamy* (1945 AD 549)) is that, even where sec. 285 has been satisfied, caution in dealing with the evidence of an accomplice is still imperative. The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone; so that satisfaction of the requirements of sec. 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although sec.

---

[2] See for example, *S v Van Aswegen*; [2001] ZASCA 61; 2001 (2) SACR 97 (SCA) para 8; *S v Trainor*; [2002] ZASCA 125; 2003 (1) SACR 35 (SCA) para 8; *S v Gentle*; [2005] ZASCA 26; 2005 (1) SACR 420 (SCA) para 27.

[3] *S v Johannes* 1980 (1) SA 531 (A) at 533B-C.

285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused.'[4]

By corroboration is meant other evidence which supports the evidence of the accomplice and renders the evidence of the accused less probable on the question in issue.[5]

[13] It is as well to bear in mind that an accused's version cannot be rejected on the basis of inherent probabilities unless it were found that it is so improbable that it cannot be reasonably possibly true. In my view there is nothing inherently improbable about the appellant's version to warrant its rejection as false beyond reasonable doubt. And as Schreiner JA made plain in *Ncanana* (at 406), acceptance of the evidence of the accomplice and rejection of the accused's evidence is appropriate only:

'[W]here the merits of the former as a witness and the demerits of the latter are beyond question.'

[14] In the circumstances of this case it was not, in my view, appropriate to accept the evidence of the first accused and reject that of the appellant. As Miller JA observed in *S v Dladla* 1980 (1) SA 526 (A) at 530H-B:

'Where a witness who is also an accused on trial not only makes a very poor impression on the Court and gives evidence which is singularly lacking in consistency and quality, but also appears to be a witness prone to exonerating himself or minimising his own responsibility at the expense of his co-accused to whom he assigns a progressively greater part in the crime . . .'

In this case the first accused was a poor witness who went to great lengths not only to minimise his role at the expense of the appellant but also, most importantly, to exonerate himself.

[15] Furthermore, the court a quo found accused number 1 to have been untruthful in a most material way in his vain attempts to exculpate himself by raising compulsion as a defence. Accordingly, there was no sound reason to accept his

---

[4] This passage has repeatedly been cited in later judgments of this court. See, for example: *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440C; *S v Scott-Crossley* [2007] ZASCA 127; 2008 (1) SACR 223 (SCA) para 7.

[5] See for example: *S v Gentle*; [2005] ZASCA 26; 2005 (1) SACR 420 (SCA) at 430j-431a; *S v Makeba & another* [2003] ZASCA 66; 2003 (2) SACR 128 (SCA) para 12.

evidence so far as it was in conflict with that of the appellant. Nor was there any justification for rejecting the appellant's evidence as not reasonably possibly true. Additionally, as alluded to above, there is yet another insurmountable obstacle in the path of the State, namely that the first accused ─ being the only witness who gave incriminating evidence against the appellant at the trial ─ was a single witness. Consequently, his evidence was required to be clear and satisfactory in every material respect.[6] In my view, the shortcomings inherent in the evidence of the first accused detract from its trustworthiness.

[16] In the result I am satisfied that the evidence of the first accused was, in its entirety, unworthy of credence for the reasons stated above and thus should not have been relied upon to convict the appellant. The State therefore failed to discharge the onus resting on it and the appellant should have been acquitted.

[17] It was for all the foregoing reasons that the order mentioned at the outset was made.

_____
X M PETSE
JUDGE OF APPEAL

[6] See for example: *R v Mokoena* 1932 OPD 79 at 80. This passage was referred to with approval by this court in *S v Sauls & others* 1981 (3) SA 172 (A) at 179H.

APPEARANCES:

For Appellant:	M J Mpshe SC (with A A Ramanyimi) Instructed by: Mvundlela & Associates Attorneys, Thohoyandou L & V Attorneys, Bloemfontein
For Respondents:	R J Makhera Instructed by: Director of Public Prosecutions, Thohoyandou Director of Public Prosecutions, Bloemfontein