THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 460/10

In the matter between:

MBANGISENI ELIAS MPUNGOSE **First Appellant**

SABELO CYRIL KHUMALO **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: *Mpungose v The State* (460/10) [2011] ZASCA 60 (31 March 2011)

Coram: CLOETE, MAYA JJA and PETSE AJA

Heard: 03 March 2011

Delivered: 31 March 2011

Summary: Criminal procedure – admissibility of hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 – hearsay evidence of identification by deceased rape complainant found admissible by trial court unreliable – conviction and sentence set aside.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Van Der Reyden J sitting with an assessor as court of first instance):

The appeal is upheld. The conviction and sentence imposed by the KwaZulu-Natal High Court are set aside.

JUDGMENT

MAYA JA (CLOETE JA and PETSE AJA concurring):

[1] The appellant was indicted in the KwaZulu-Natal High Court (Pietermaritzburg) on (a) a charge of rape of 15 year-old Celukuphila Mlambo (the deceased) and – together with his co-accused, Sabelo Cyril Khumalo – (b) further charges of the murders of the deceased, her mother Teyisile Bulawelani Myaka and her 14 year-old cousin, Sipho Ndawonde, (c) unlawful possession of two AK47 rifles and (d) unlawful possession of several live rounds of ammunition. He pleaded not guilty to all the charges but was convicted of rape and sentenced to undergo life imprisonment. Khumalo was convicted only of unlawful possession of firearms and ammunition and

sentenced to undergo an effective term of imprisonment of 20 years. The court below granted both men leave to appeal against their convictions and sentences to this court but Khumalo, who was granted R30 000 bail pending appeal, did not pursue the matter. Thus, only the appellant prosecuted his appeal before us.

[2] It became clear during the hearing of the appeal that the appellant had been wrongly convicted. To avoid any further prejudice to him – he had been in custody since 2004 – we decided to make an *ex tempore* order to ensure his immediate release. Accordingly, his conviction and sentence were set aside. The following are the reasons for that decision.

[3] The nub of the State case in the trial proceedings[1] was that the appellant raped the deceased, who subsequently identified him to the police and that he, upon his release from custody on bail and with the assistance of various mediators, tried to have her family withdraw the rape charge. When his attempts failed and the trial looked set to proceed, he murdered the deceased, her mother and their young relative who was visiting their home at the time. (The three deceased were brutally gunned down at their home, during the night, just a month before the date on which the rape trial was due to commence.)

[1] It bears mention that the trial proceedings appear to have been so highly charged that the court personnel including the trial judge had been threatened with death and had to be placed under heavy guard for the duration of the court hearing.

[4] In seeking to prove its case against the appellant, the State relied, inter alia, on (a) two statements made by the deceased to the police shortly after the rape, which it successfully applied to have admitted in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 as they constituted hearsay evidence in view of her death and unavailability to testify at the trial; (b) a medical report prepared by the district surgeon who examined the deceased; and (c) the testimony of the following witnesses: Mr Lakalubi Anthony Nxele, a local taxi operator and shopkeeper, who found the deceased immediately after the rape; his wife, Audrey Nxele, to whom he handed over the deceased; Detective Sergeant Langeni, the police officer who arrested the appellant after the deceased identified him as the culprit; Messrs Bhekuyise Mthethwa, Bhekokwakhe Blessing Qoma, Eric 'Zazi' Qoma, Mshoniseni Nzama and Mrs Ntombikayise Qoma (Mrs Qoma) who alleged to have approached the deceased's family at the appellant's instance to seek pardon for the rape; and Mr Maphethelo Solomon Myaka, the deceased's maternal uncle to whom, it was claimed, the entreaties were made.

[5] On the undisputed facts it is clear that the deceased was raped – the hotly contested issue was whether the appellant was her assailant. The medical report handed in by agreement recorded that the deceased's private parts were bloodied, bruised and swollen and that her hymen had fresh tears. The district surgeon's

conclusions were

'Grass found on the perineum and outside the labia. Definitely raped and on a bush/dry grass area'.

[6] The relevant viva voce evidence began with Nxele's account that whilst driving home, he saw a distraught partially dressed young girl, who was screaming and clasping some of her clothing in her hands, run into the road. He stopped his vehicle to investigate. She told him that she had been raped by a man unknown to her who drove a silver grey Golf 4 vehicle. A vehicle fitting that description which was owned by the appellant, a fellow taxi operator he knew, had just driven past him travelling in the opposite direction. He took the deceased home to his wife who would be better placed, as a woman, to assist her. He then reported the matter at the police station but did not mention that he had seen the appellant's vehicle near the rape scene.

[7] Mrs Nxele confirmed that her husband had brought the deceased home. She was crying and her mouth was swollen. Her skirt was torn and she was covered in grass. The deceased recounted her ordeal and described the rapist's vehicle to her. She wrote its registration numbers on a piece of paper which she gave to her husband as he was going to the police to report the matter.

[8] The actual rape is described in the deceased's statements whose admission is one of founts of controversy in this appeal. (I deal in due course with the admissibility of

these statements.) The first statement records that it was made at 17h49 on 13 July 2004, the day of the rape which had occurred around 13h00. It reads:

'Celukuphila Ngizwe Mlambo states in Zulu under oath.

1.

I am Celukuphila Ngizwe Mlambo and African female youth born in 1989-09-10 (15) residing at Onyango Area under Induna Sibisi, a leader at Isihlahlasenkosi High School doing Grade 8 and a victim in this case.

2.

On 2004-07-13 at about 13:00 I was at KwaMusi Bus stop (T-juction to Obhokweni Area) waiting for a bus as I was proceeding to Okhukho Area. I came across an unknown a/female who was waiting for a transport to Nongoma at the bus stop.

3.

A certain Silver Grey Gold, I can't recall the vehicle's registration number but I gave it to Mrs Nxele of Obhokweni Store driven by an unknown make but I can be able to identify him, approached us and requested me from that unknown a/female to accompany him in order to direct him to a certain homestead at Obhokweni Area. I refused and that a/female insisted that I accompany him eventually I agreed but I was reluctant to go since I feared for my life should anything happen to me.

4.

We then drove off and at a certain spot the driver complained about a running stomach. He then stopped the m/vehicle he then walked around it and came towards my door and opened it he ordered me to get off. I refused saying that I don't see any homestead in that area. Since he was insisting I alighted from the m/vehicle and he showed me a certain path towards the forest.

5.

When we reached that forest he closed my mouth with his hand and toppled me with his feet and I fell with my face towards the ground. When I tried to wake up he grabbed me with my hand and turned me upwards. After that he ordered me to take off my skirt. I refused and he pulled it off forcefully. He then instructed me to take off my panty I didn't respond and he took it off and also my takkies.

6.

After that he got on top of me and ordered me to open up for him (he said "phakamisa imilenze') I did not respond and he grabbed both legs and held them upwards he then came in between my legs. He then inserted his penis inside my vagina followed by up and down movements for several times during that process he was trying to kiss me and when I tried to close my mouth he threatened me with his firearm.

7.

I tried to scream since I was feeling some pains but he continued. He also took his saliva with his finger trying to smear it on my vagina but I pushed the hand away. After he had finished he gave me the toilet paper to wipe my private parts. After that he left me there.

8.

I can be able to identify my rapist he was short light in complexion with scars on his face (izingcabo) short hair, he was wearing a khaki jacket, khaki takkies, navy with white stripes pair of trousers and golf shirt.

9.

I also wish to state that I didn't give consent to my rapist to have sexual intercourse with me and I desire police investigation. That is all I can state.'

[9] The second statement is dated 15 July 2004. It reads:

'I am a complainant in this case. To my statement I made before there are facts which I would like to add which were omitted due to the fact that I wrote the previous statement after having been traumatised.

The incident occurred on 2004/07/13 at about 13:00 at KwaZola Area while I was at Ngculaza bus stop proceeding to Okhukho Area coming from Onyango Area. At the bus stop I was with an unknown woman. While still there a silver grey motor vehicle came from Zola direction. The motor vehicle was being driven by a driver unknown to me and there were no passengers in it. He stopped next to us and said I should come to him. I refused and the woman I mentioned above told me to go to him and I did as I was told. On my arrival to him he requested me to accompany him so as to call him a certain lady residing at Obhokweni Area. I then boarded the said motor vehicle and the road we were using is between the forest and is proceeding to Obhokweni Area.

Then we were right in the forest the driver told me that he was suffering from stomach ache and he stopped the motor vehicle and said to me I should also come out of the m/vehicle so that he could show me the homestead of the lady I was going to call and I refused and ran away. I tried to shout calling for assistance but he used his hand to shut my mouth and he pulled me into the bush. When we were in the bush he pushed me down and pressed me with his knee on my breast. He told me to pull off my panty and I refused and seeing that I was refusing he pointed me with a small firearm. I refused and seeing that I was not responding he pulled my skirt off and it tore in the front.

He then pulled off my panty and he slept on top of me. I shouted and he throttled me on the neck and told me open my legs apart and I refused then took his firearm with one hand and promised to shoot me. He pulled my legs apart and he got inside during that time he had already pulled off his trousers.

He then told me to open my mouth I refused seeing that I was refusing he forced my mouth apart and he put his tongue inside my mouth I bit his tongue. He pressed me down and continued to eject his penis inside my vagina and made up and down movement till he ejaculated and finished. He then took out a tissue inside his pocket and told me wipe the smear. I took the said tissue and wipe my private part (vagina). I then dressed up and took my bag and proceeded to Obhokweni. He then

took a U-turn. I went for about a few distance and came van driver by Mr Nxele. He stopped and asked my identity and I told him. I further told him that I had been raped by an unknown male person who was driving a silver grey. He then said to me I should inform my mother of all what happened.

I alighted at his store at Obhokweni Area and he told me to tell the whole story to his wife I also told her the registration number of the motor/vehicle which was used by the suspect. The registration number of the suspects m/vehicle is ND 354 645 silver grey. She wrote the registration number on a small paper. She then phoned the police and the police came. The police took me to the doctor and a statement was taken from me.

The police took me to Mr Nxele's homestead and on the following day the police came back and said I should come in hurry and we went to Ulundi. On our arrival to Ulundi I was fortunate to see the motor vehicle that was used by the suspect who raped me. In fact I easily identify it by its colour and registration number. The said car had four to five people inside.

The police stopped it and the police told me to point the person who raped me and without hesitation I pointed him out because although it was my first time to see him I easily described him even to the police at the police station when making a statement. The suspect was then arrested.'

[10] Detective Sergeant Langeni, the arresting officer, testified that after receiving Nxele's report he fetched the deceased from Nxele's home and took her to the police station. There, she was attended by a police-woman who took her first statement and arranged her medical examination. The deceased had to undergo a further medical procedure on the following day. As he drove her to the surgery in Ulundi, the deceased pointed out a silver grey VW Golf vehicle with registration numbers ND 357645 at a set of robots. He stopped the vehicle and its driver, the appellant, and his three passengers got out. He was explaining to the appellant why he had stopped him when the deceased, whom he had left in the police van, got out of the vehicle and came to them. She pointed at the appellant, crying, and said 'here is the person who raped me'. The appellant asked him what was going on. He then told him about the rape and explained that the deceased was identifying him as the culprit. The appellant did not respond and he arrested him.

[11] Next in the chain of evidence came Myaka. He told of receiving various

delegations who approached him at the appellant's behest. Some, he said, visited his home in his absence. The first delegate was Mthethwa, a fellow worshipper and preacher in the Shembe Church. Mthethwa told him that he represented the appellant who apologised for raping the deceased and offered compensation of ten or fifteen head of cattle. He refused the offer and told Mthethwa that the matter was in the hands of the police. Mthethwa returned shortly, at night, in the company of two men, Dlamini and Buthelezi who said they worked with the appellant in the taxi industry. They said the appellant was in the vehicle in which they travelled and requested Myaka and his family to meet him at Ulundi to discuss the matter as his bail conditions restricted his movements. He told them he would first have to confer with his family.

[12] He convened a family meeting at which the request was rejected and duly communicated the decision to Buthelezi telephonically. In the meantime, he had reported the incident to his church whereafter another delegation manned by Mthethwa, Nhlobofana Buthelezi, Edwil Dlamini (who had since died) and the Qoma men approached his family. They still sought forgiveness for the appellant and requested Myaka to accompany them and the appellant to the Shembe Church leader, Inkosi Shembe. He refused both requests.

[13] Then testified Mthethwa, the Qomas and Nzama. Except for Nzama, who from

his account had not had any contact with the appellant in a long time, all these witnesses knew the appellant only by sight. The Qomas and Nzama were closely related to the Myakas. Of the group, only Mrs Qoma did not have links with the taxi industry and did not claim direct contact with the appellant, alleging to have been approached by Eric and dealt only with him, Bhekokwakhe and a woman she did not know.

[14] These witnesses said the appellant told each of them that he had raped the deceased, and asked them to tender his apology for his wrongdoing and offer compensation in cattle or cash in return for the withdrawal of the rape charge against him. The Qoma men said the appellant offered them incentives for their efforts if successful – they were each promised a R2 000 reward and Bhekokwakhe was further promised employment as a driver of a taxi the appellant would purchase.

[15] According to Mthethwa, the appellant approached him in September 2004 and asked him to tender his apology and compensation offer of six cattle to Myaka. The latter's response was that Inkosi Shembe wanted to meet the rapist. He told Myaka that the appellant was willing to do so but first sought the family's forgiveness. Myaka wanted to discuss the matter with his family and they parted on that note. Shortly thereafter, the appellant sent him on a return mission with two business associates, Dlamini and Buthelezi. Myaka said he had reported the matter to his

family and had no answer for them. At the appellant's insistence, he phoned Myaka on the following day to request him to accompany the appellant to the meeting with Inkosi Shembe. Myaka refused.

[16] Subsequently, Mthethwa, Dlamini, Buthelezi and others accompanied the appellant to the church where they met the Inkosi. The appellant told the Inkosi that he had come to seek forgiveness for raping a child, Mthethwa continued. The appellant, followed by the rest of the group, then gave the Inkosi a R100 donation in accordance with the church's practice whereafter the Inkosi blessed them and they left. After this visit the appellant asked him to inform Myaka that he had seen Inkosi Shembe. He returned to Myaka's home with Dlamini, Buthelezi and the Qoma men, with whom they travelled from the taxi rank. He repeated the appellant's apology and tender of compensation. This time Myaka, who had gathered his male relatives, told them that he could not help them because the deceased was not his, but his sister's child. That was his last effort and he was not further involved in the matter.

[17] The Qoma men – who were uncle (Eric) and nephew (Bhekokwakhe) – confirmed attending the mediation meeting with Mthethwa and recounted two prior meetings with Myaka, who Bhekokwakhe said he regarded as his own father. The peace-offering which the appellant mandated them to tender was ten cattle, they said. (But in his police statement Eric said the appellant offered to pay the deceased's

family a sum of R10 000 which, when raised in cross-examination, he said he forgot to mention.) Myaka had told them that Inkosi Shembe wanted the rapist to present himself to the church and seek its forgiveness. According to the Qomas, contrary to Mthethwa's version, on the day they approached Myaka with Mthethwa, the latter told Myaka that Inkosi Shembe wanted the rape charge withdrawn and Myaka undertook to enquire from the Inkosi how he could do that.

[18] At that meeting, the Qomas said, the Myakas had remonstrated with them for aligning themselves with the appellant when they were related to their family. But, despite being admonished, their involvement in the matter did not end there. They, instigated by the appellant and a woman said to be his sister, made further, unsuccesful attempts thereafter to persuade the deceased's mother directly, with the help of her cousin and work colleague married into their family, Mrs Qoma (she confirmed her involvement in those efforts), to withdraw the charge in return for ten cattle.

[19] Nzama, the last witness in this regard, said that he was initially approached by Eric (who, however, did not mention this in his testimony) with the message that an acquaintance of old in the taxi industry, the appellant, sought his help and wished to contact him. He, thereafter, received a phone call from the appellant who requested him to enquire from Myaka when he could deliver the cattle for the 'wrong he had

committed'. He then went to Myaka with Bhobho, Myaka's brother. Myaka reported that the appellant had just left and that he had told his delegation, who said they had seen Inkosi Shembe about the matter, that he would also consult the Inkosi. That was the end of his involvement.

[20] The appellant testified and denied any wrongdoing, pointing out that he did not match the description given by the deceased to the police. He denied admitting the rape, seeking forgiveness therefor or sending mediators to the deceased's family. In the latter regard, he stated that according to Zulu tradition a person who sought another's forgiveness sent members of his own family, sometimes with neighbours (but his own family's involvement was crucial) as his emissaries. He was not related to any of the alleged mediators, whom he barely knew if at all. They were instead relatives or close family friends of the deceased. He said that the State witnesses Mthethwa, both Qoma brothers and Nzama all belonged to the IFP (despite their denials) and opposing camps within their taxi association arising from political differences – the Bhengu group and Nkalankala Zuma's group. He could not therefore trust them because of their divergent interests in the taxi business and political differences. He said he met Mthethwa at the Shembe Church only during a visit there for a taxi violence related issue and merely requested his help as one of the church's elders to jump the queue and meet the leader of that church.

[21] He raised an alibi that he was away in Durban on the day of the rape. He had travelled there with a colleague, Dlamini and the latter's wife to meet Mr Winter Mvelase, the chairperson of the Long Distance Taxi Association. They sought Mvelase's counsel because there was conflict in the taxi business in their area and the chairperson of their local taxi association had died. They needed Mvelase's guidance on ways to restore peace and conduct elections for a replacement leader as the Minister (presumably of the Department of Transport) had made regulations concerning the procedures governing the election of taxi association functionaries with which they were unfamiliar.

[22] According to the appellant, his problems started when he resigned his membership from the Inkatha Freedom Party (the IFP) and joined the African National Congress (the ANC) whilst residing in the IFP-dominated area of Nongoma-Ulundi. That decision earned him and his parents great ire from their IFP indunas and tribal authority who tried, albeit unsuccessfully, to expel them from their locality. Two attempts had been made on his life between 1991 and 2001 which led him to employ bodyguards (he had two VIP bodyguards at the material time and one testified in the trial in respect of the other charges) for protection.

[23] He said he had previously been falsely implicated in various criminal cases, one, a widely publicised matter in the KwaZulu-Natal High Court before JH Combrink J

who acquitted him when the state witnesses confessed to a conspiracy to have him arrested on false charges. The second attempt on his life followed shortly after his acquittal in this matter. About three weeks before his arrest he had received a telephone call from an unknown man who urged him to return to the IFP or face the consequences. He believed the rape charge was yet another scheme against him by his political opponents because of his ANC membership and prominent position in the taxi industry. According to him, Nzama probably bore him a grudge for not using his influence (which he withheld because of Nzama's involvement in taxi volence) to help him secure a coveted taxi route in the latter half of 2004.

[24] Mvelase testified on the appellant's behalf and confirmed meeting him and the Dlamini couple at Elangeni Hotel, Durban around 15h00 on a busy day during which one of the meetings he attended concerned the bus industry and the election of its board of directors. The appellant had telephoned a few days beforehand and requested the meeting. The purpose of the meeting was to discuss the election process of the chairperson of the Mahlabatini Taxi Association, to which the appellant belonged, as the incumbent official had recently died and his advice was sought because of his involvement in the provincial structures of the taxi council.

[25] He met them briefly at the hotel's parking lot and arranged to meet them later, at 17h00, as he had an imminent meeting to attend. They met later as arranged,

discussed business and then parted. As far as he could recall, the appellant and his party travelled in a white Honda Ballade. In his experience, the trip between Ulundi, from where the appellant came, and Durban took four to five hours because of the road's sharp bends, heavy traffic and constant police surveillance. About three months later the appellant telephoned him and told him of his arrest in connection with a rape committed on the day of their meeting. The appellant requested him to vouch for his whereabouts and he agreed.

[26] This is the conspectus of the evidence led at the trial. The court below accepted the evidence of all the State witnesses, including the hearsay evidence. Regarding the hearsay evidence, it relied on the decision of this court in *S v Ndhlovu*,[2] for its finding that 'the totality or mosaic of the State case len[t] support to the credence and evidential value of the hearsay evidence contained in the [deceased's statements]' and was satisfied that the quality of such 'hearsay evidence and the extraneous reliability guarantors' justified its admission. Needless to say in the light of the available evidence, the hearsay evidence was the mainstay of the State case and the main basis for the appellant's conviction.

[27] The defence version, including the alibi evidence, was summarily rejected as false. Without giving any reason for its preference for the State version regarding the

[2] S v Ndhlovu 2002 (2) SACR 325 (SCA).

evidence of the mediators, the court below held

'We have no hesitation in rejecting [the appellant's] explanation for his visit to Inkosi Shembe as false beyond reasonable doubt. We are satisfied that we can accept Mr Mthethwa's evidence as truthful . . . Having done so we accept that [the appellant] approached these witnesses with the request to persuade Mr Myaka to have the rape charge withdrawn.'

[28] The one 'flaw' in the appellant's version which was identified in the judgment of the court below was his failure to respond with a denial when the deceased pointed him out as her attacker. The alibi evidence was found false beyond reasonable doubt because, according to the court, Mvelase had 'conceded' that the appellant could have obtained his guidance telephonically rather than travel to Durban; he had no independent recollection of the day of the meeting and accepted that it occured on 13 July 2004 because the appellant told him so; and his evidence that the appellant drove a Honda vehicle contradicted the appellant's version that he drove his silver grey Golf 4 vehicle.

[29] The real issue on appeal remains whether the appellant was properly identified as the rapist and the challenge to the decision of the court below relates, mainly, to the admissibility of the hearsay evidence, the weight the court below attached to the evidence of the mediators and its rejection of the appellant's alibi.

[30] I deal first with the evidence of the mediators. The court below acknowledged

the ‘differences and apparent contradictions in their evidence’ but found them trifling having regard to the fact that ‘there were several delegations and protracted negotiations over a period of time’. In the court’s view, the inconsistencies rather supported the absence of a conspiracy to falsely implicate the appellant. But it found that the appellant’s use of the word ‘rape’ in the course of the negotiations did not constitute an admission and was used ‘merely as a reference to the charge he was facing’.

[31] I respectfully disagree with these findings. Apart from the contradictions relating to the dates, times and number of the meetings, the parties present thereat, the number of cattle or even the nature of compensation offered by the appellant and the responses of the deceased’s family (which are not detailed exhaustively in the summary of the evidence above) there are other factors to be considered which, in my view, detract from the evidence of these witnesses.

[32] First, it is readily apparent from the record that the mediation witnesses (I deal later with the quality of the testimony of the Nxeles), with the exception of Mrs Qoma who was examined only briefly and not on the relevant aspect, lied when they were questioned about their political affiliations and the political dynamic in their area which constituted an important part of the appellant’s defence. All claimed to have been born and bred in Ulundi. Whilst one understands their reticence regarding their

political allegiance, if any, which they were not in any event compelled to disclose, they were extremely evasive. Pleading ignorance, they steadfastly refused to answer even innocuous questions relating to the existence of political activity let alone the existence of the political organisations IFP and ANC in the area.

[33] There is then the evidence of a custom which requires the wrongdoer's family to negotiate pardon on his behalf said, by the appellant, to be commonly practised in Zulu tradition, which was corroborated by two State witnesses. Myaka's response when it was suggested to him in cross-examination was that he had in fact asked Mthethwa why the appellant had not sent members of his own family to him. Nzama also did not deny its existence and merely said that the appellant did not employ it but chose to approach him. The appellant insisted that he would have followed that custom had he made the alleged approaches and no reason presents itself on the evidence as to why he should be disbelieved.

[34] As indicated, it was common cause that the appellant and the mediators barely knew one another. Without even considering the appellant's theory of a trumped-up charge borne of political enmity and business jealousy to which these witnesses were party, to my mind, it strains credulity that a person who had been charged with an extremely serious offence meriting the maximum penalty and thus knew the extent of his troubles, would openly admit committing the offence to strangers he knew had

close ties with his victim even before they agreed to assist him as was alleged. I find it even harder to believe that those people, in turn, with a damning admission in hand, would simply acquiesce and shilly-shally over a protracted period instead of promptly rejecting and reporting the unwanted advances to the authorities.

[35] There is another feature of the evidence that, I think, merits attention in this regard. One of the State's intended witnesses, Ms Mamrie Sibongakonke Ngcamu, did not testify. However, she had given the police an elaborate and damning account against the appellant, detailing at great length her attempts to persuade the womenfolk of the deceased's family to withdraw the rape charge against the appellant, her boyfriend's employer, on the promise of a cash reward if she succeeded, and how the appellant committed the murders in her presence when mediation failed. She recanted her statement before the trial commenced and, quite bizarrely, confessed to a plot to falsely implicate the appellant. Whilst all sorts of inferences may be drawn from her recantation, one nonetheless cannot speculate and her conduct must be viewed against the backdrop of acceptable evidence. The appellant's testimony of other attempts to impute false charges against him was not gainsaid and Ngcamu's strange conduct and the other factors, in my view, create considerable suspicion and cast doubt on the veracity of the mediators' testimony and their motives.

[36] I have serious reservations too about the rejection of the appellant's version

when it was not shown to have been inherently improbable.[3] This is particularly so when it is apparent that the court below misconstrued or disregarded portions thereof. For example, the court below found, as part of 'the mosaic of the State case' which lent credence to the hearsay evidence, that the appellant's 'only response [when identified by the deceased] was merely to ask what was going on', 'did not respond with a denial' and 'elected to remain silent'. This finding constitutes a misdirection as it overlooks the appellant's unchallenged evidence that when the deceased pointed him out he did ask what was going on and started to explain that the deceased was making a mistake but was silenced by Langeni who instructed him to give his explanation at the police station. Other than this feature, the court did not say why it found the appellant's version unsatisfactory. Similarly, State counsel was unable to point out to us any flaw in his evidence which would justify its rejection.

[37] Regarding the alibi evidence, which received equally short shrift from the court below, one of the reasons it gave for rejecting Mvelase's evidence, ie that the appellant had given him the date of their meeting, is not borne out by the record. Mvelase stated categorically, without challenge, that the appellant did not mention the actual date to him and merely told him that he was accused of committing a rape on the day on which they had met. He then proceeded to explain that he recalled the day because of the nature of his discussions with the appellant whom he met for the first

[3] *S v Shackell* 2001 (2) SA 185 (SCA) para 30; *S v V* 2000 (1) SACR 453 (SCA) para 3.

time and the bus meeting.

[38] A court's approach to alibi evidence is trite. The burden rests only on the State, to

prove it false and if, on a totality of the evidence, there is a reasonable possibility that it is true, then there exists the same possibility that the accused has not committed the crime.[4] And where the alibi or denial of guilt might reasonably be true, the State has failed to discharge its onus to prove beyond reasonable doubt that the accused is guilty and he must be acquitted.

[39] It must be considered that Mvelase had no close relationship with the appellant and, thus, no reason to lie for him. The very fact that he gave a wrong description of the vehicle driven by the appellant, in my opinion, shows his lack of interest in exculpating the appellant and the outcome of the case. The description of the vehicle which the appellant drove on the relevant day, being one of the key components of the

alibi, one reasonably expects that he would otherwise have been drilled on that aspect if he was a witness of convenience.

[40] He, obviously, was not told what to say in court. In any event, he stated that he

[4] *R v Biya* 1952 (4) SA 514 (A) at 521D-E; *R v Hlongwane* 1959 (3) SA 337 (A) at 340H-341B; *S v Shabalala* 1986 (4)

had no clear recollection of the vehicle. The reasons he gave for remembering the

SA 734 (A) at 736B-C.

particular day seem, to me, entirely cogent. And, contrary to the approach of the court below, the appellant's decision to have a personal meeting with their provincial chairman, an important official, seems more fitting than a casual telephone discussion particularly considering the serious and sensitive nature of the matters in respect of which they sought advice.

[41] As to the hearsay evidence, its admission is permissible if the jurisdictional factors and safeguards set out in s 3(1) of the Act are present. Section 3(1)(c) thereof, which was invoked by the State for the admission of the deceased's statements, provides:

'3. **Hearsay evidence**

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless–

. . .

(c) the court, having regard to–

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

In terms of subsec 3(4), 'hearsay evidence', for the purposes of the section, 'means

evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

[42] The challenge to the hearsay evidence related mainly to its probative value and the prejudice its admission entailed to the appellant. I must say at the outset that in dealing with this evidence, the court below seems to have paid inadequate attention to the fact that the deceased, whose evidence would not be tested in cross-examination with all the dangers that posed,[5] was also a child and a single witness in respect of the issue of identification (which created a greater potential for mistaken observations and other risks such as suggestibility). This court has repeatedly emphasized the need for scrupulous scrutiny when dealing with hearsay evidence especially that of identification.[6]

[43] In *S v Mamushe* v *The State*[7] Brand JA neatly encapsulated the legal position as follows:

'[W]hat has by now become axiomatic, is that our courts apply considerable restraint in allowing (or relying on) hearsay evidence against an accused person in criminal proceedings. The reasons for this restraint have become equally well settled. They flow mainly from the nature of the onus that rests on the state and from the rights of an accused person underwritten by the Constitution (see eg *S v Ramavhale* 1996 (1) SACR 639 (A) at 647i-648b; *S v Ndhlovu* [2002 (2) SACR 325 (SCA)]

[5] *S v Webber* 1971 (3) SA 754 (A); *S v Sauls* 1981 (3) SA 172 (A); *R v Manda* 1951 (3) SA 158 (A) at 163C-F; *S v V* 2000 (1) SACR 453 (SCA).
[6] See, for example, *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-D; *S v Charzen* 2006 (2) SACR 143 (SCA) para 11.
[7] *Mamushe v The State* [2007] SCA 58 (RSA) paras 16 and 18.

para 16 at 337a-c). An important consideration in deciding whether the court should overcome its general reluctance to admit the hearsay evidence under consideration in a particular case, relates to the role that the evidence will play. It stands to reason that a hearsay statement which will only serve to complete a 'mosaic pattern' will be more readily admitted than one which is destined to become a vital part of the of the state's case ...

. . .

[B]y its very nature, hearsay evidence cannot be tested in cross examination. The possibility of mistake can therefore not be excluded in this way. The result is, in my view, that hearsay evidence of identification can only be admitted if the possibility of mistake can safely be excluded in some other way, eg with reference to objectively established facts.'

[44] Relevant to this enquiry is the issue of the rapist's identification which the hearsay statements sought to establish. As has been mentioned, the appellant strenuously challenged the identifying features given by the deceased in her police statement. He protested during his evidence, that he was not of light complexion. Furthermore, according to the record, his facial features were inspected by the trial judge during argument on the merits of the case and consensus was reached that whilst he had old facial scars, he had no *izingcabo* marks although nothing was then said about his complexion. But it does not appear from the judgment of the court below that it considered this crucial aspect of the evidence at all in the final analysis.

[45] The appellant's persistent protestations and offer to present himself before the appeal court for inspection in his heads of argument prompted us to direct counsel to furnish us with his photograph to enable us to assess the disputed features. His photograph was subsequently filed jointly by the parties' legal representatives together with a joint memorandum which recorded their observations. We were also furnished with a photograph of another prisoner with *izingcabo* marks for comparative purposes. The appellant's photograph, as acknowledged by both counsel, clearly showed that the appellant's complexion is dark and that his face bears no *izingcabo* marks. The marks on the appellant's face, such as they are, cannot by any stretch of the imagination be confused with izingcabo marks- the latter are deep and long, three over each cheek and one on the forehead; the former are hardly noticeable by comparison. How this glaring discrepancy which goes to the heart of the case (and which counsel for the State was constrained to concede, severely impacted on the State case) escaped the attention of the court below is beyond comprehension.

[46] In her first statement given to the police a few hours after the rape, the deceased stated that she no longer remembered the registration numbers of her assailant's vehicle but said that she had given the particulars to Mrs Nxele who wrote them down. Surprisingly, in her next statement made two days later, after the appellant's arrest, she remembered these details. She said the vehicle's registration numbers were 'ND 354645'. Mrs Nxele gave, from memory, an identical description in her police

statement of the same day. Strikingly, the description of each witness, whilst close, did not match the appellant's vehicle whose registration numbers were 'ND 357645'.

[47] It seems to me that the fact that these two individuals made the same mistake should have stirred considerable unease in the mind of the trial judge. This is particularly so considering the mysterious fate of the crucial scrap of paper with the registration numbers of the rapist's vehicle, which Mrs Nxele said she gave to her husband to give to the police, for which no one accounted but did not appear to have reached the police. Another cause for concern is the appellant's evidence, which the prosecutor did not challenge, that there were other vehicles of the exact make and colour as his in the Mahlabatini area.

[48] There is, furthermore, Nxele's curious failure to tell the police that he had seen the appellant's vehicle in the vicinity of the rape scene when he reported the offence after leaving the deceased in his wife's care. On both his and his wife's version, the deceased had carefully described the assailant's vehicle to them. From that description he should have recognised the appellant's vehicle, well known to him by his account. It would have been most natural for him in those circumstances to tell the police that the description of the assailant's vehicle matched that of a colleague's vehicle he had seen near the rape scene just after the rape.

[49] His excuse for this vital omission under cross-examination was that he had received an anonymous phone call threatening to impoverish him if he did not distance himself from the rape incident. But, on his version, the alleged threat was made some days after the incident and his visit to the police. It simply could not have influenced his decision to conceal this valuable evidence.

[50] None of these discrepancies, which were all material and demanded explanation, seem to have been considered by the court below. In my view, they each cast serious doubt on the reliability of the description of both the rapist and his vehicle given by the deceased and severely compromised the probative value of the hearsay evidence. Contrary to the finding of the court below in this regard, the 'extraneous guarantees of reliability' envisaged in *Ndhlovu* did not exist in the light of these inconsistencies. The admission of the deceased's statements entailed serious prejudice, both procedural and substantive, to the appellant and ran counter to the interests of justice. The hearsay evidence, which, as I have said, was not merely another piece of the puzzle but was pivotal to the State case and thus fell in the category cautioned against in *Mamushe*, should not have been admitted.

[51] This finding destroys the State case as what remains of its non-hearsay evidence does not link the appellant to the offence in any way. (A DNA analysis had been conducted but was inconclusive and despite the deceased's statement that she had

bitten the rapist's tongue, that does not seem to have been investigated.) The State therefore failed to prove its case against the appellant beyond reasonable doubt.

MML Maya
Judge of Appeal

APPEARANCES:

For the appellant: JE Howse

Instructed by: SP Mncwango & Associates, Durban

Ponoane Attorneys, Bloemfontein

For the respondent: N Maphalala

Director of Public Prosecutions, Pietermaritzburg

Director of Public Prosecutions, Bloemfontein