THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case number : 53/04

In the matter between :

TSINYANE SOLOMON MAMUSHE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM : **BRAND, VAN HEERDEN JJA *et* THERON AJA**
HEARD : **8 MAY 2007**
DELIVERED : **18 MAY 2007**

Summary: Extra-curial statements by state witness – not admissible in evidence against accused person under s 3(1)(b) of Act 45 of 1988 unless confirmed by maker in court – admission of statements 'in the interest of justice' in terms of s 3(1)(c) of the Act considered but refused – reliability of identification by single remaining witness considered.

Neutral citation: This judgment may be referred to as *Mamushe v The State* [2007] SCA 58 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] The appellant stood trial in the Vereeniging Circuit Court, before Whiting AJ and two assessors, on charges of murder, robbery, unlawful possession of a firearm and unlawful possession of ammunition. All four charges arose from an incident that occurred on 31 January 1997 in Evaton near Vanderbijlpark when Mr Kapok Joseph Mhala ('the deceased') was shot and killed in the course of an armed robbery. Despite his plea of not guilty, the appellant was convicted on all four charges and then sentenced as follows: on the count of murder, to life imprisonment; on the count of robbery, to 15 years imprisonment; and on the counts of unlawful possession of a firearm and ammunition – taken together for purposes of sentence – to 3 years imprisonment. His appeal against these convictions and sentences is with the leave of the court *a quo.*

[2] It was not in dispute that the deceased was fatally shot or that he was robbed of virtually all the money in his possession at the time, though the exact amount could not be established. The circumstances under which it happened were also largely common cause. The issue was whether the evildoer was the appellant, as alleged by the state. In essence the state's case relied on the eyewitness testimony of Mr Kgoto Albert Ramakgula as corroborated by the extra-curial statements of Ms Bessie Martin from which she disassociated herself at the trial.

[3] Ramakgula was the deceased's assistant in a truck that delivered milk on behalf of Clover Dairies to tuck shops in the Evaton area. The deceased was the driver, who also took control of the money received from customers, while Ramakgula was responsible for the physical deliveries. On 31 January 1997 they started their rounds at about 4 am. They made various deliveries and on each occasion Ramakgula handed over the money he collected to the deceased. Eventually they arrived at the tuck shop of Ms Martin where the fatal incident occurred. This was about 10:30 in the morning. They entered

her premises through a gate and stopped near the tuck shop about 20 meters further on.

[4] According to Ramakgula he made his delivery of milk in the shop to one of Ms Martin's children from whom he received an amount of R60. On his way back to the truck, he saw two men approaching from the direction of the gate, directly behind the vehicle. There were no other persons in the vicinity. Ramakgula got into the truck and was about to hand over the money he had just received to the deceased, who had by that time already started the vehicle and engaged the reverse gear. The two men Ramakgula had seen approaching earlier then appeared one on each side of the vehicle. The one on the driver's side had a handgun in his hand. Through the open driver's window he fired a shot into the right side of the deceased's chest. A second shot was fired, but at that stage Ramakgula was already jumping out of the vehicle. As the vehicle was moving at the time when Ramakgula jumped out, he was almost run over. The vehicle continued to move backwards until it crashed into a stone border near the gate to the premises.

[5] The person who had fired went to the vehicle. He pushed the driver aside and searched him. While this was happening the other person did nothing. He just stood in front of the vehicle. After that the man with the firearm walked away from the scene and the other one followed him until they both disappeared around a corner. Ramakgula drove the vehicle to the police station where he made a statement. The deceased appeared to be already dead. They searched him but found no money on him except for R20 in his back pocket. Although Ramakgula did not know the exact amount he handed to the deceased, he could say that it was substantially more than R20.

[6] Ramakgula identified the man with the firearm as the appellant. Though he did not know his name, he said, he had seen him about four or five times over a period of about four weeks immediately prior to the incident at various tuck shops in the vicinity. The other man, who was with the accused, he had not seen before. He also testified that, after he had been to the police station, he returned to the scene. There he heard Ms Martin giving the name of the assailant to the police. He was unable, however, to remember what that

name was. During cross-examination it was put to Ramakgula that the appellant would admit that he was in the vicinity when the deceased was shot, but would contend that it was one Armstrong Songela and not he who was the assailant. Ramakgula nevertheless persisted in his version that it was the appellant who had shot the deceased.

[7] The other pillar of support for the state's case consisted of three extra-curial statements allegedly made by Ms Martin to the investigating officer, Detective Sergeant Khahliso Moolman, between May and October 1997. According to the first statement, she was in her garden near the tuck shop on 31 January 1997 when she heard two shots. Immediately thereafter, she said, a man ran past her with a firearm in his hand. She identified the man as the appellant who was well-known to her. She called out asking what he was doing, but he did not answer. He just kept on running. In the second and third statements she again confirmed that the man she saw with the handgun was the appellant, but added that she would not be willing to identify him at an identification parade or to testify against him in court, because she feared for her own safety as well as for the safety of her business.

[8] At the trial Ms Martin was called as a witness by the state. She confirmed that she was the owner of the premises where the deceased had been shot and that she heard two shots being fired that day. She denied, however, that she saw the appellant, or for that matter, any other person with a gun. In fact, she testified, she never even saw the appellant that day. She also denied that she conveyed the contents of any of the three statements to Sergeant Moolman. She admitted that she signed these statements but, she said, she did so because Sergeant Moolman intimidated her and threatened to arrest her if she refused to sign. What in fact happened after she heard the shots, she testified, was that she went into her house and prayed. After that, she saw the deceased's truck where it had crashed into the stone border and many people gathering around it. When the people had left she went to the vehicle where she found the deceased who was already dead.

[9] The state sought leave to hand in Ms Martin's three prior statements under s 190(2) of the Criminal Procedure Act, 51 of 1997 in order to have her declared a hostile witness. The trial court decided, however, that since Ms Martin contended that the statements were made under duress, a trial-within-a-trial should first be held to establish whether they were freely and voluntarily made.

[10] During the trial-within-a-trial Sergeant Moolman was called to testify. Ms Martin also gave further evidence. She persisted in her allegations of duress which were denied by Sergeant Moolman. At the end of these interlocutory proceedings, the trial court held that the statements had been freely and voluntarily made and that they correctly reflected what Ms Martin had told Sergeant Moolman at the relevant times. Thereupon the contents of these statements were admitted against the appellant.

[11] On appeal, the court *a quo* was criticised, on behalf of the appellant, for insisting on a trial-within-a-trial procedure in order to determine whether extra-curial statements by a state witness were freely and voluntarily made. Though there appears to be some justification for the criticism, nothing turns on it in my view and I thus refrain from further comment on the procedure adopted by the trial court in this regard.

[12] The appellant testified in his own defence. The contents of his evidence was essentially as foreshadowed in what had been put to Ramakgula. Though he admitted that he was in the vicinity of Ms Martin's tuck shop when the incident occurred, the shots were fired, on his version, by Armstrong Songela, who had died of unnatural causes between the date of the incident and the trial. He was cross-examined on a so-called warning statement he made to Sergeant Moolman at the time of his arrest in May 1997. According to the statement his version was that he was not at the scene of the incident and that he had only heard of the attack on the deceased three days later. The appellant denied, however, that he had ever made this statement. Apart from finding the appellant an unreliable witness, the court *a quo* concluded that the state's case was in fact strengthened by his false

version of how the killing occurred. If Songela was indeed involved, so the court reasoned, the appellant would have made a statement implicating him the first time he was confronted by the police, which he did not do.

[13] It is plain, in my view, that the statements by Ms Martin were of vital importance to the state's case. If these statements were rightly admitted, it seems almost inevitable that the conviction must be upheld. The first pivotal question is thus – were the contents of the statements rightly admitted as evidence against the appellant? The position with regard to an inconsistent statement is normally that it is admissible only to discredit its maker and not to prove the truth of its contents (see eg *Hoskisson v R* 1906 TS 502 at 504; *R v Deale* 1929 TPD 259 at 260; Johann Kriegler & Albert Kruger *Hiemstra, Suid-Afrikaanse Strafproses* 6 ed (2002) at 484). The reason is that, even where the statement is admitted to discredit its maker, its contents remain hearsay evidence. The court *a quo* appreciated this, but nevertheless found the contents of the statement admissible under the exception provided for by s 3(1)(b) of the Law of Evidence Amendment Act 45 of 1988 ('the Act'). Section 3(1) of the Act confirms the common law rule that hearsay is generally not admissible in evidence. It then creates certain categories of exception. One of these is in s 3(1)(b) which lifts the ban if 'the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings'. On the basis of this section the court *a quo* held that:

'Although the statements are hearsay they are admissible in terms of s 3(1)(b) . . . in view of the fact that Ms Martin herself testified at the proceedings.'

[14] From this statement it is apparent that, relying on a literal interpretation of s 3(1)(b), the court *a quo* came to the conclusion that an extra-curial hearsay statement becomes admissible as long as the maker testifies at the hearing and that it matters not whether the maker then confirms or disavows the statement in evidence. This conclusion is, however, in direct conflict with the later decision of this court in *S v Ndhlovu* 2002 (2) SACR 325 (SCA), which held that s 3(1)(b) only renders and extra-curial statement admissible if it is *confirmed* by the maker in evidence during the court proceedings. The reason for this decision appears, *inter alia*, from the following explanation by Cameron JA (para 30 at 342e-g):

'If the witness, when called, disavows the statement, or fails to recall making it, or is unable to affirm some detailed aspect of it . . ., the situation under the Act is not in substance materially different from when the declarant does not testify at all. The principal reason for not allowing hearsay evidence is that it may be untrustworthy since it cannot be subjected to cross-examination. When the hearsay declarant is called as a witness, but does not confirm the statement, or repudiates it, the test of cross-examination is similarly absent, and similar safeguards are required.'

[15] The court *a quo* thus erred in admitting the statements in under s 3(1)(b). It follows that the only possible basis upon which their contents could be admitted against the appellant would be by virtue of the provisions of s 3(1)(c). Under this section hearsay becomes admissible if the court, having regard to the considerations listed in this sub-section, forms the opinion that it should be admitted 'in the interest of justice'. Because of the view the court *a quo* held with regard to the meaning of s 3(1)(b), it never considered exercising its discretion under s 3(1)(c). On appeal this court has, however, been asked by the state to admit Ms Martin's statements in terms of the last-mentioned sub-section.

[16] I turn to the question whether we should accede to the state's request. What 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 (supra)* 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 state's case (see eg *S v Ramavhale (supra)* at 649d-e). To my mind it is clear that Ms Martin's statements will fall into the latter category.

[17] Another consideration is the reliability of the hearsay evidence. The court *a quo's* reasoning in this regard appears from the following statement by Whiting AJ:

'The effect is thus that the court has before it two conflicting versions given by Ms Martin of what she saw on the occasion of the shooting. Often the fact that a witness has given two conflicting versions of an event will lead a court to conclude that neither version is reliable. But this will not always be so. Much depends on the facts and circumstances of the particular case.

At present it is a well known fact of life in South Africa that witnesses, . . . are often very reluctant to give evidence for fear of reprisals against them if they should do so. That Ms Martin was indeed affected in this way in the present case is borne out by what she said in her second and third statements to Sergeant Moolman. We can think of no reason why Ms Martin would falsely implicate the accused. In view of the considerations I have mentioned, it would appear to be very much against her private interest to do so. It seems very much more likely, particularly in view of her second and third police statements, that she was too frightened to tell the truth when she gave evidence before us.'

[18] I am prepared to accept, without deciding, that, despite her denials, Ms Martin probably did make the statements to Sergeant Moolman and that she was probably telling the truth when she did so. Untruthfulness, however, is not the only danger. The other danger is that she might have been mistaken. Particularly with reference to identification evidence, the danger of mistake has been underscored by our courts again and again (see eg *S v Mthetwa* 1972 (3) SA 766 (A) at 768; *S v Charzen* 2006 (2) SACR 143 (SCA) para 11 at 147i-j). By 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 be safely excluded in some other way, eg with reference to objectively established facts.

[19] In this matter there is no way to test the accuracy of the observations Ms Martin deposed to in her statements. On the contrary, according to her testimony in court it would, as a result of physical obstructions impeding her view, be virtually impossible for her to make those observations from her garden where she stood. It is true, of course, that at that stage she was trying her utmost to distance herself from the contents of the statements.

Nonetheless, her evidence about the physical obstructions remained uncontested. In the circumstances the identification evidence deposed to by Ms Martin in her statements appears to be of the most unreliable kind. For these reasons we should not, in my view, accede to the state's request to admit these hearsay statements under the provisions of s 3(1)((c) of the Act.

[20] The next question is whether the evidence of Ramakgula, on its own, is sufficient to justify the appellant's conviction. The court *a quo* found Ramakgula an honest witness. I have no reason to doubt the correctness of that finding. However, the danger that again looms large, is the possibility of mistaken identification. The court *a quo* found reassurance in the fact that the witness had sufficient opportunity to make his observations in that he was looking directly at the assailant when he fired the shot. This reassuring factor is, however, diluted to a material extent by the contents of two statements which Ramakgula made to the police. According to these statements he told the police that both the assailant and his companion were armed with firearms and that the companion was pointing a firearm at him when the killer shot the deceased. Although Ramakgula distanced himself from these statements in evidence, it is difficult to conceive why the police would fabricate this version. It almost goes without saying that if this version is to be accepted, Ramakgula's opportunity of observing the killer would be materially reduced.

[21] The court *a quo* also found reassurance in the fact that Ramakgula had seen the appellant on about four occasions prior to the incident. The problem is, however, that on Ramakgula's own version he had heard the assailant being identified by Ms Martin shortly after the incident. Although he could not remember the name that Ms Martin mentioned, it appears from the context that she most probably mentioned the name of the appellant. Apart from the inherent danger of suggestion, any mistaken identification by Ms Martin would thus have poisoned the evidence of Ramakgula as well. Additional support for the notion that Ramakgula's identification of the appellant may be the result of suggestion, seems to derive from his own evidence that Moolman provided him with some description of the appellant long before he testified in court. Confidence in Ramakgula as a witness is further diminished by the fact that,

in a statement to Moolman, Ramakgula referred to the assailant and his companion as 'two black men unknown to me'. In cross-examination Ramakgula ascribed this to a misunderstanding between him and Moolman. But according to Moolman's testimony, Ramakgula was indeed unable to give a description of the assailant 'because of the fear he was under'. As to how Ramakgula was then able to identify and describe the appellant at a later stage, Moolman volunteered the following solution:

'[M]aybe that which he said in court is based on what he gathered from Evaton . . . on that which Ms Bessie [Martin] told him.'

[22] In the light of all these difficulties, it is in my view self-evident that the appellant cannot be convicted solely on the basis of Ramakgula's testimony. Lastly there is the appellant's mendacity as a witness. Though false denials by an accused person will often strengthen the state's case, it cannot serve as the sole basis for conviction. It too often happens that innocent persons cannot resist the temptation of putting as great a distance as possible between themselves and criminal offences, even by deceitful means.

[23] For these reasons:

The appeal is upheld and the convictions and sentences are set aside.

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F D J BRAND
JUDGE OF APPEAL

Concur:

VAN HEERDEN JA
THERON AJA