IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 510/2002

In the matter between:

NOMPITHIZELO MARY MAKEBA **FIRST APPELLANT**

SOMIKAZI ALICIA NTAMBULA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **HOWIE P, MTHIYANE JA and SHONGWE AJA**

HEARD: **21 MAY 2003**
DELIVERED: **30 MAY 2003**

Summary: Corroboration of accomplice – confession of co-accused used as corroboration for accomplice's evidence.

JUDGMENT

MTHIYANE JA:

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[1] The first and second appellants and one other person, accused no 1, were arraigned in the South Eastern Cape Local Division before Liebenberg J and assessors on charges of murder, unlawful possession of a firearm and unlawful possession of ammunition. The appellants were acquitted on the latter charges but convicted of murder and sentenced to life imprisonment. Accused no. 1 was convicted on all the counts. He was sentenced to life imprisonment for murder and one year's imprisonment for unlawful possession of the firearm and unlawful possession of ammunition. The one year sentence was ordered to run concurrently with the life sentence. With leave of the court *a quo* the appellants now appeal to this Court against both their convictions and sentences. Accused no. 1 is not a party to this appeal.

[2] The charges against the first and second appellants (accused no's. 2 and 3 at the trial) arose out of an incident which occurred on the night of 10 August 1999 when one Pindile Michael Makeba (the deceased) was shot and killed in his house at Motherwell, Port Elizabeth. It is common cause that the deceased was killed by accused no. 1 (Mbongqi). The State alleged that Mbongqi had been hired by the appellants.

[3] The key witness for the State was one Skhumbuzo Makeba, the deceased's son. His evidence was that early in August 1999 whilst at school he received a message

to go and see the first appellant. After school Skhumbuzo went to see the first appellant and found her with the second appellant. The latter informed him that the appellants had found a ‘sharpshooter’ to kill the deceased. It was then suggested that he would take the killer to show him the deceased’s house. For this he was promised money.

[4] Subsequently, on 10 August 1999, Skhumbuzo received a message from his uncle one Mpumelelo Makeba, that the first appellant had phoned in his absence requesting Skhumbuzo to call on her without fail that evening so that she could give him money to buy shoes, and further that if he failed to do so she would use the money. On this occasion Mbongqi, who had been sent for by the second appellant, was also present. The second appellant asked Skhumbuzo to take Mbongqi to the deceased’s house. On the way Mbongqi took out a firearm and began to load the magazine. When they got to the house Skhumbuzo unlocked the security gate and the kitchen door and walked Mbongqi through to the deceased’s bedroom where he put on the light. The deceased, who was by then already in bed, was awoken and when he asked Skhumbuzo who he was with, the latter answered that he was with a school friend. The deceased ordered them to leave the room. Skhumbuzo left the room taking the lamp with him. He left it in the kitchen and ran out of the house onto the neighbour’s property. Soon thereafter he heard a gunshot. He waited for a while and then returned to the house where he found the deceased with a bullet wound in the head. Skhumbuzo then locked the house and

went to his uncle, Mpumelelo's, house where he reported the shooting to his sister, Kunzuzwa.

[5] Later that night Skhumbuzo made a statement to the police denying all knowledge of the shooting. He averred that he had been to the gym earlier that evening and upon his return had discovered that the security gate had been broken open and that his father had been shot. And he had no reason to suspect anyone.

[6] On 22 October 1999 Skhumbuzo made a second statement. On this occasion he implicated Mbongqi, the first and the second appellants in the killing of the deceased, but not himself. He admitted taking Mbongqi and showing him the deceased's house but alleged that he did so for fear of being shot by Mbongqi.

[7] Sometime after Skhumbuzo had made his second statement the investigating officer, Inspector Winter, requested him to conduct a conversation with the first and second appellants which would be recorded by video recorder. On an agreed date the recording was done. The conversation was transcribed and its admissibility was the subject of heated debate in the court *a quo*. It was challenged by the defence on two grounds: first, it was argued that it violated the appellants' right to privacy and, secondly, that it had been done without first obtaining a judicial order in terms of section 3 read with section 2 of the Interception and Monitoring Prohibitions Act 127 of 1992 ('the Act') I will revert to the video recording and the debate around it later in the judgment.

[8] On 9 November 1999 Skhumbuzo made a third statement in which he now implicated not only Mbongqi and the appellants, but himself as well. The statement

was, however, made after Winter had confronted him with Mbongqi's confession and pointed out the respects in which his second statement differed from Mbongqi's confession. The appellants gave evidence in their defence and denied Skhumbuzo's story and their alleged participation in the shooting and killing of the deceased.

[9] Against this background it is clear that the case against the appellants rested solely on the evidence of Skhumbuzo, an accomplice and a single witness. It is trite that the evidence of a single witness must, in order to lead to a successful conviction, be clear and satisfactory in every material respect.[1] The matter was compounded by the fact that Skhumbuzo made three contradictory statements on oath. In evaluating his evidence the court *a quo* was, in my view, correct in concluding that corroboration or some feature which eliminated the risk of false incrimination was required for a conviction to follow. It appeared here that the court *a quo* was confronted with a case where the merits of the accomplice as a witness and the demerits of the accused were not beyond question and that the minimum requirements laid down by Schreiner JA for a conviction on the evidence of an accomplice were applicable.[2] Beginning with what the court considered to be the relevant feature which reduced the risk of false incrimination, the court *a quo* said:

'Wat vir ons insiggewend is en wat vir ons die indruk versterk dat die risiko dat hy nou in hierdie hof valse getuienis gee verminder, is die feit dat toe hy deur Inspekteur Winter genader

[1] Hoffman and Zeffertt – The South African Law of Evidence 4 ed at 573
[2] *R v Ncanana* 1948 (4) SA 401 (A) at 405-406 and *S v Mpompotshe and Another* 1958 (4) SA 471 (A) at 476F

was en meegedeel was dat beskuldigde 1 ‘n bekentenis aan die landdros gemaak het, hy ‘n volgende verklaring gemaak waarin hy ‘n volledige uiteensetting gegee het van wat gebeur het wat strook met sy getuienis in hierdie hof en strook met die openbarings wat deur beskuldige nr. 1 in sy bekentenis gemaak is en dit het hy gemaak voordat aan hom meegedeel was wat die inhoud was van beskuldige 1 se bekentenis.’

[10] The basis for the above conclusion is far from clear because Winter’s evidence in cross-examination is to the following effect. Before Skhumbuzo made his third statement Winter apprised him of the respects in which his earlier statements differed from Mbongqi’s confession. It was only after realizing that the game was up, it would seem, that Skhumbuzo decided to give a third statement and to implicate all and sundry (himself included). It is true of course that later in cross-examination Winter performed a *volte face* and said that he had not gone through the confession with Skhumbuzo. But the fact remains that Skhumbuzo was told what the discrepancies were. In those circumstances there is in my view absolutely no guarantee that Skhumbuzo did not proceed to then tailor his third statement in accordance with Mbongqi’s confession. The point is illustrated in the following passage from the record:

‘MNR SCHOONRAAD Die derde verlaring, voordat u die derde verklaring geneem het by Sikumbuzo het u vir hom gewaarsku volgens Regtersreëls? --- Dis reg u Edele.

En het u ook vir hom gesê dat daar ‘n moontlikheid is dat u hom gaan gebruik as ‘n Staatsgetuie? --- Dis reg u Edele.

En het u vir hom gesê wat die teenstrydighede is tussen die verklaring van beskuldige 1 en sy tweede verklaring --- Dis reg Edele.’

[11] After disposing of the feature he considered relevant to the elimination of false incrimination the court *a quo* then proceeded to deal with the question of whether there was corroboration for Skhumbuzo's evidence or not. The judge enumerated three features which, in the court's view, satisfied the rule. These were, first, the condition in which the deceased's house was found immediately after the shooting. He considered this to be in line with Skhumbuzo's evidence. The second was the evidence of Mpumelelo concerning the telephone message the first appellant left for Skhumbuzo, which version differed from that of the first appellant. The third was the fact that Mbongqi's confession was in all essential respects the same as the evidence given by Skhumbuzo in court. The judge considered the latter conclusion to be fortified by the fact that there had been no communication between Mbongqi and Skhumbuzo before Mbongqi made his confession or before Skhumbuzo gave evidence. The validity of this conclusion is, with respect, open to doubt, given the fact that on his own admission Winter took Skhumbuzo through the discrepancies between his second statement and Mbongqi's confession, before the third statement was made. It therefore follows that by the time Skhumbuzo gave evidence his version could well have been tailored in such a way as to fall in line with that of Mbongqi's confession, given his various conflicting statements.

[12] Before dealing with the factors relied on by the court *a quo* as corroboration for Skhumbuzo's evidence it is necessary to restate the rule with reference to the

nature of corroboration required. In S *v Mahlabathi and Another*, [3] Potgieter JA said:

'It is clear from the authorities that if corroboration was required it had, for the purpose of the so-called cautionary rule, to be corroboration implicating the accused and not merely corroboration in a material respect or respects. (See *Ncanana's* case at p. 405; *R v Mpompotshe and Another*, 1958 (4) S.A. 471 (A.D.) at p. 476; *S v Avon Bottle Store (Pty) Ltd. And Others*, 1963 (2) S.A. 389 (A.D.) at p. 392.

I would like to emphasis that, as was pointed out by SCHREINER, J.A., in *Ncanana's* case, *supra* at p.405, it is not a rule of law or practice that requires the Court to find corroboration implicating the accused, but what is required is that the Court should warn itself of the peculiar danger of convicting on the evidence of the accomplice and seek some safeguard reducing the risk of the wrong person being convicted, but such safeguard need not necessarily be corroboration. Once, however, the Court decides that in order to be so satisfied it requires corroboration, it would be pointless to look for corroboration other than corroboration implicating the accused.' [Emphasis added]

[13] In my view none of the factors mentioned by the court *a quo* amounts to corroboration implicating the appellants in the commission of the crime. I fail to see how the circumstances which prevailed at the house of the deceased immediately after his death, and the differences as to the contents of the telephone call made by the first appellant, amount to corroboration in the sense envisaged in the rule. At best for the State the evidence of Mpumelelo merely confirms that the call was made. I do not see how the discrepancy between the evidence of

[3] 1968 (2) SA 48 AD at 50G-51A
See also Hoffmann and Zeffertt supra at 573

Mpumelelo and that of the first appellant assists. The first appellant does not deny that she made the call but says that she does not remember what she said. She admits that the offer to buy shoes for Skhumbuzo is something that she could have said, because it was usual for her to buy for Skhumbuzo. His father did not always provide for him. The first appellant since her marriage to the deceased in 1984 did not have children of her own. Skhumbuzo and his sister, Kunzuzwa, were born of a previous relationship between the deceased and another woman. They lived with the first appellant and the deceased and were brought up and nurtured by the first appellant from a young age. She treated them as her children.

[14] The use of Mbongqi's confession as corroboration for Skhumbuzo's evidence was a fatal flaw in the assessment of his evidence. Section 219 of the Criminal Procedure Act 51 of 1977 forbids it. That section provides:

> 'No confession made by any person shall be admissible as evidence against another person.'

Even indirect use of the confession for purposes of corroboration is not permitted. In *R v Baartman and Others*[4] an accused had made a confession and the trial court in convicting the other accused had excluded from its consideration the statements in the confession which had directly implicated the other accused, but had used the confession to establish an essential part of the chain of circumstantial evidence leading to their conviction. On appeal it was held that the trial court had relied on inadmissible evidence and the appeal was allowed. It follows, therefore, that no

[4] 1960 (3) SA 535 AD at 542 B-D
See also *R v Kefasi and Another* 1966 (1) SA 364 (SRA)

reliance should have been placed on Mbongqi's confession as corroboration for Skhumbuzo's evidence, either directly or indirectly. That misdirection was fundamental to the credibility finding in favour of Skhumbuzo on which the conviction essentially depended. (It is of course unnecessary in this case to consider the admissibility of a co-accused's extra curial admission – as opposed to a confession.)[5]

[15] The court *a quo* says in its judgment that reliance was placed on the contents of the video recorded conversations between Skhumbuzo and the appellants in disbelieving them in so far as the recording indicated certain aspects which did not tie up with the first and second appellants' denial of involvement in the killing of the deceased.

[16] In my view, on a proper reading of the transcript of the recording it is clearly neutral and does not contain any admissions. Although it formed a major part of the debate at the trial none of the parties made any issue of it on appeal. Relying on *S v Kidson*[6], the court *a quo* found that Skhumbuzo was a participant monitor and not a third party monitor, which if he had been, his evidence would have fallen foul of ss 2 and 3 of the Act and would have been liable to be excluded. The judge found further that the recording was admissible, notwithstanding that it was initiated by the police and the conversation took place at the offices of the police, without the knowledge and consent of the appellants. I will assume, without

[5] c*f S v Ndhlovu* 2002 (6) SA 305 (SCA)
[6] 1999 (1) SACR 338

deciding, that the transcript of the video recording was properly admitted. Having said that, it is my considered view, as I say, that it is neutral and does not take the state case any further. Nor is it necessary for purposes of this judgment to express an opinion on the decision in *S v Kidson*, supra.

[17] For all his deficiencies as a witness the judge *a quo* found Skhumbuzo to be a satisfactory witness and even went on to say:

'Om Skhumbuzo se getuienis hier in die hof te verwerp, sou ons ook moet bevind dat hy hierdie storie opgemaak het, indien dit wat beskuldigdes 1, 2 en 3, in die hof sê, waar is.'

This approach is with respect flawed. The test is and remains, whether there is a reasonable possibility that the appellant's evidence may be true. And that must be decided on all the evidence.

'A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence.'[7]

It was therefore not necessary for the court *a quo* to reject Skhumbuzo's evidence as a fabrication before deciding whether to acquit the appellants.[8] It was enough if there was a reasonable possibility of their versions being true.

[18] Skhumbuzo was a single witness and his evidence, in my view, was deficient in a number of respects, the most telling of which was the making of three contradictory statements on oath. The court *a quo* found that Skhumbuzo had been manipulated by the appellants-hence he went along with the plot to kill his father. I have not been able to find any justification for this conclusion from the record.

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[7] *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101b; *S v Trainor* 2003 (1) SACR 35 (SCA) para 8
[8] See *R v M* 1946 AD at 1026

Skhumbuzo was 26 years of age at the time of his father's death and was no longer a child of tender years. The trial court relied on passages in the transcript in which the appellants told Skhumbuzo not to say anything to the police. In all the circumstances that was understandable. It does not point to manipulation.

[19] The first and second appellants were found to be unsatisfactory witnesses. The court *a quo* found them to be argumentative, aggressive, evasive, garrulous and that on certain occasions they did not answer questions put to them. Counsel for the state was hard pressed to support these findings. Indeed, they are not borne out by the record. I have not been able to find any justification for them. In any event the appellants did not bear any *onus* to prove their innocence. All that had to be established was whether their versions might reasonably possibly be true. I can find no justification for the rejection of their evidence.

[20] For the above reasons I would uphold the appeal and set the conviction and sentence aside.

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KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

HOWIE P
SHONGWE AJA