THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 677/2020

In the matter between:

THERESA FORTUNATE MABASO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mabaso v The State* (677/2020) [2021] ZASCA 98 (09 July 2021)

Coram: MBHA and MBATHA JJA and CARELSE, PHATSHOANE and MABINDLA-BOQWANA AJJA

Heard: 12 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 09 July 2021.

Summary: Criminal Law – a confession by an accused shall not be admissible as evidence against his or her co-accused – a previous inconsistent statement by a hostile witness is only admissible to discredit that witness – no other evidence implicating appellant in the murder of the deceased – appeal upheld and conviction for murder set aside.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mpumalanga (Ngobeni AJ, sitting as court of first instance):

1 The appellant's application for condonation for the late filing of her Notice to Appeal, is granted.

2 The respondent's application for condonation for the late filing of the respondent's heads of argument, is granted.

3 The appeal is upheld. The appellant's conviction for murder is set aside, and the order of the high court is replaced with the following order:

'Accused 2 is found not guilty of murder as charged and is acquitted.'

JUDGMENT

Mbha JA (Mbatha JA and Carelse, Phatshoane and Mabindla-Boqwana AJJA concurring):

[1] On 25 April 2018, the appellant, Ms Theresa Fortunate Mabaso, who was accused 2, was convicted of murder by Ngobeni AJ in the high court, Circuit Local Division of the Eastern Circuit Division, Mbombela, now called the Mpumalanga Division (the high court). On 21 September 2018, the appellant and her co-accused, Mr Wiseman Mlamuli Ngomane (Mr Ngomane), who was accused 1, were both sentenced to life imprisonment for murder, after the high court found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence. Mr Ngomane was also sentenced to various periods of imprisonment for housebreaking with intent to commit murder, robbery committed with aggravating circumstances and for unlawful possession of a firearm and ammunition, which were ordered to run concurrently with the term of life imprisonment. This appeal, which is with leave of the high court, is against the appellant's conviction. There is no appeal by Mr Ngomane.

[2] The parties have given their written consent for the disposal of this appeal on the papers without oral argument in terms of s 19*(a)* of the Superior Courts Act 10 of 2013. There are two preliminary applications by the respective parties that must first be disposed of before delving into the appeal. First, the appellant applies, in terms of rule 12 of the Rules of the Supreme Court of Appeal (the rules), for condonation for her failure to comply with

rule 7(1)*(b)* of the rules, by not filing a notice to appeal within the prescribed one month period after leave to appeal against her conviction for murder was granted by the high court. Second, the respondent applies for condonation for the late filing of its heads of argument. The parties are opposing each others respective application.

[3] The appellant's notice to appeal was filed simultaneously with the application for condonation on 19 August 2020. As leave to appeal against the conviction was granted on 21 September 2018, the appellant's notice was filed approximately 23 months out of time.

[4] The appellant has explained that she was convicted for murder on 25 April 2018 but that the high court did not provide reasons for its order on that day. The matter was then adjourned to 24 July 2018, and the high court ordered that she remain in custody. The high court handed down judgment and its reasons on 24 July 2018. The appellant subsequently decided to obtain new legal representation, which necessitated procuring a transcription of the entire proceedings to enable her new attorneys to familiarise themselves with the case.

[5] The appellant has furnished correspondence showing that her new attorneys started writing to the Registrar, Pretoria, from 18 July 2018 requesting a transcript of the recordings. No less than 20 letters were sent to the office of the registrar in this respect. It was only on 23 March 2020 when the registrar informed the appellant's attorneys that the transcription was ready for collection. However, this unfortunately coincided with the announcement and proclamation of the national state of disaster and the Alert

Level 5 lockdown (the lockdown), which was put into place due to the Covid-19 pandemic. The appellant's attorneys were thus only able to obtain the record on 20 July 2020.

[6] In my view, whilst the period of non-compliance for the filing of the notice was extraordinarily lengthy, the appellant has furnished a reasonable explanation for the delay. Furthermore, in light of the view I take of this appeal, which will be demonstrated later in the course of this judgment, and the fact that the respondent has not shown that it will suffer prejudice if the application was granted, I am accordingly of the view that it is in the interests of justice that the appellant's non-compliance should be condoned.

[7] The respondent's heads of argument were filed three months out of time. Part of the explanation given is that there was an honest mistake that occurred in the respondent's office relating to the allocation of the matter, which was exercebrated by the lockdown. It has not been shown that granting the condonation requested by the respondent will cause the appellant any recognisable prejudice. In the circumstances, I am satisfied that the respondent's application for condonation ought likewise to be granted.

[8] The background facts and the circumstances in relation to the count of murder, which is the subject matter of this appeal, are largely common cause. They are briefly as follows. During the early hours of the morning on 8 November 2013, three male persons, armed with a firearm and ammunition, approached the house of the deceased, Mr Sifiso Michael Mabuza, at stand number 1376, Langeloop Trust, Tonga, Mpumalanga. At the time, the deceased, who was a member of the South African Police Service (the SAPS)

holding the rank of constable, and a minor child were sleeping in one of the bedrooms.

[9] Two of the assailants forcefully gained entry into the house through a window whilst one of them remained outside and kept a lookout. After a physical struggle with the deceased, one of the two assailants shot him in the chest. The assailants robbed the deceased of his official SAPS issued firearm, after which all three fled the crime scene. The deceased died of a gunshot wound to the chest.

[10] Mr Ngomane was indicted with Mr Sindi Richman Mvubu (Mr Mvubu) and Mr Victor Sibiya (Mr Sibiya) as accused 1 to 3 respectively, on all the five counts referred to in paragraph 1. Mr Sibiya died before the commencement of the trial. Mr Mvubu was, on 8 June 2016, convicted on all five charges consequent to his plea of guilty amplified by his statement, that was tendered in terms of s 112(2) of the Criminal Procedure Ac 51 of 1977 (the CPA). He was subsequently sentenced to 28 years' imprisonment for the offences, 10 years of which were suspended for a period on certain conditions. Effectively, he had to serve 18 years' imprisonment for the crimes.

[11] In his statement in terms of s 112(2) of the CPA, marked exhibit 'F', Mr Mvubu implicated the appellant in the murder of the deceased. He stated that on the day before the incident, the appellant summoned him, together with Mr Ngomane and Mr Sibiya, to her place where she requested him to kill the deceased. The reason she had wanted the deceased killed was because the deceased had arrested her and confiscated her drugs and vehicle. He said the

appellant gave him a deposit of R10 000 to execute the killing and promised to give him a further R16 000 when the deceased was killed.

[12] On the day after he had been sentenced, and having agreed to testify as a State witness in the subsequent criminal trial of Mr Ngomane and the appellant, Mr Mvubu was brought before Captain Madala Nwele Ndlovu (Captain Ndlovu) of the SAPS, to whom he gave a further statement marked exhibit 'E', detailing his involvement in the crimes. In this statement, Mr Mvubu again implicated the appellant saying that on 7 November 2013 she phoned him and said that she wanted him to kill the deceased. He then met the appellant who explained to him that the deceased had arrested her and locked her up in the cells. He said the appellant told him she was prepared to pay him a sum total of R46 000, inclusive of a deposit of R10 000. She then paid him the deposit. Thereafter, he met Mr Ngomane and Mr Sibiya at a tavern where they planned the murder of the deceased.

[13] Before the high court, a confession made on 6 January 2014 by Mr Ngomane, before a magistrate, Mr O E Moletsane, was handed in and accepted as an admission in terms of s 220 of the CPA. In this statement, which was marked exhibit 'D', Mr Ngomane implicated the appellant in the crime of murder by stating that she was the one who hired Mr Mvubu to kill the deceased and paid him R10 000 as a part payment of the total sum of R46 000, which she undertook to pay him for the killing. Mr Ngomane stated that the appellant's reason for wanting to have the deceased killed was that the deceased had impounded her vehicle when it was found transporting dagga and illicit cigarettes.

[14] The State led the evidence of various witnesses who gave *viva voce* evidence, none of which directly implicated the appellant. The State also led the evidence of Mr Mvubu in an attempt to corroborate the contents of both his plea statement in terms of s 112(2) of the CPA, and the statements he gave to Captain Ndlovu on 8 June 2014, marked 'E'and 'F'respectively.

[15] It transpired that Mr Mvubu had also made another statement under oath marked exhibit 'G', to Warrant Officer M L Bhembhe on 30 November 2013. In this statement, Mr Mvubu alleged that the appellant undertook to pay him R60 000 if he killed the deceased. The appellant further undertook, according to this statement, to procure the murder weapon and then provided him with her cell phone numbers. However, he said that he never called the appellant. Later he received a call from another person advising him that the deceased had been killed.

[16] The contents of Mr Mvubu's statement marked exhibit 'G' are markedly in contrast to those in his statement marked exhibit 'E'. In exhibit 'E', Mr Mvubu stated that the appellant offered him a total sum of R46 000, which included a R10 000 deposit that he shared with Mr Ngomane and Mr Sibiya. Importantly, he stated unequivocally, in contrast to what he said in exhibit 'G', that he was involved when they went to the deceased's homestead where he was killed. Mr Ngomane was the person, according to Mr Mvubu, who entered the deceased's house through the window and fired the fatal shot killing the deceased. The contract killing amount changes remarkably in Mr Mvubu's plea statement marked exhibit 'F', where he mentioned the total amount to be paid by the appellant to be R26 000.

[17] When Mr Mvubu testified, he denied that he ever pleaded guilty previously. On being questioned about his plea statement marked exhibit 'F', he said he could not remember his statement being reduced to writing and being read into the record before he was convicted and sentenced. Although he admitted to having taken part in the killing of the deceased, he stated in contradiction to both his statements marked exhibits 'E' and 'F', that Mr Ngomane was not present at the time and that it was instead the latter's brother, Mr Mantinti Innocence Ngomane, who was the third person involved, and is the person who actually unlawfully entered the deceased's home through a window. Furthermore, Mr Mvubu testified that their purpose for entering the deceased's home was to steal and obtain firearms and not, as was recorded in both his statements, at the initiation of the appellant.

[18] After a trial within a trial, after which the statement marked 'E' was ruled admissible, Mr Mvubu was declared a hostile witness in terms of the provisions of s 190 of the CPA. Under cross-examination by the State, Mr Mvubu denied that he was hired by the appellant to kill the deceased. He said that it was the police who insisted that he should say that the appellant was the person who hired him to commit the murder.

[19] The appellant on the other hand testified that she was actively involved in dealing in dagga and that she was arrested and convicted on two occasions. She confirmed that on the last occasion when she was arrested, her Hyundai i20 motor vehicle, which she used to convey the dagga, was impounded. Upon her release, the deceased visited her at her home and told her that he was the person who had provided the information concerning her dealing in dagga to other police officals, as a result of which she was arrested and her vehicle was

impounded. The deceased then suggested that they work together in illicitly selling the dagga, but she turned down his overtures. She further testified that the deceased even undertook to assist her to have her impounded vehicle released back to her. She denied ever instructing or hiring Mr Mvubu or anybody to carry out the murder of the deceased.

[20] The high court accepted that the contents of exhibit 'E' consisted of direct evidence on how the murder of the deceased was committed by Mr Mvubu, Mr Ngomane and Mr Sibiya, and the role played by the appellant in the matter. It also found that Mr Mvubu had repeated the contents of exhibit 'E' in his guilty plea marked 'F', which was accepted into evidence, and that it was highly unlikely that he could have repeated what he knew to be false in his guilty plea, having regard to the consequences thereof about which he had been adequately warned.

[21] The high court took into consideration the testimony of the appellant namely, that she was a self-confessed dealer in dagga, that she was arrested and as a result her vehicle was confiscated, and that the deceased had made overtures to assist her in receiving her vehicle back. The high court then concluded that the previous inconsistent statement was interlinked with all the evidence which proved the guilt of the appellant.

[22] In its evaluation of the evidence, the high court correctly accepted that the State did not lead direct evidence implicating the appellant in the killing of the deceased. The high court also accepted as trite law, the common law principle that a previous inconsistent statement was only admissible to discredit the witness, but not as the evidence of the facts stated therein. The

question that had to be answered, the high court reasoned, was whether a statement made by a hostile witness had sufficient evidential value, when evaluated and assessed with all the evidence tendered in its totality. The high court placed reliance in the matter of *S v Mathonsi*,[1] where a full bench of the KwaZulu-Natal High Court, Pietermaritzburg, held that a court is entitled to make substantive use of the previous statement by a hostile witness and give the statement, as evidence, the appropriate weight, provided sufficient guarantees of reliability are present. The full bench further found that the statement could also be utilised for substantial purposes as an exeption to the hearsay rule, the basic principles being that a conspectus of all the evidence was required.

[23] The only evidence that implicated the appellant in the deceased's murder is that contained in Mr Mvubu's statement marked exhibit 'E' and his plea of guilty made in terms of s 112(2) of the CPA, marked exhibit 'F', both made on 8 June 2016.

[24] In my view, the high court, with respect, mischaracterised the reasoning of the full bench in *Mathonsi*.[2] In *Mathonsi* the full bench held that evidence contained in a prior inconsistent statement is such that it would only be admissible if given in court. The high court failed to follow this important guideline prior to admitting Mr Mvubu's prior inconsistent statements.

[25] Furthermore, the statement marked Exhibit 'E' is a confession in which Mr Mvubu implicated the appellant. Section 219 of the CPA states in explicit language that 'no confession made by any person shall be admissible as

[1] *S v Mathonsi* 2012 (1) SACR 335 (KZP).
[2] See fn 1 above.

evidence against another person'. This rule has been applied consistently in various cases in this Court and the Constitutional Court. In *Makhubela v S; Matjeke v S*,[3] the Constitutional Court confirmed that extra-curial confessions and admissions tendered by an accused are inadmissible against a co-accused and, therefore, cannot be used against a co-accused. In *Nndwambi v S*,[4] this Court stated the following:

'As the State has conceded, the admission incriminating the appellant should not have been sufficient to discharge the State's onus of proving the appellant's guilt beyond a reasonable doubt. The appellant denied any involvement in the commission of the offences and no evidence was led by the State other than that of the accused who incriminated his co-accused.'

[26] It follows that the high court clearly misdirected itself by failing to recognise that Mr Mvubu's previous statement marked exhibit 'E', was only admissible to discredit him. It was not admissible as evidence against the appellant.

[27] The admission that Mr Mvubu made in his plea statement in terms of s 112(2) of the CPA, exhibit 'F', in which he implicated the appellant must suffer the same fate. The high court ought not to have admitted it against the appellant.

[28] There is another aspect which in my view should have been regarded as an insurmountable obstacle for the State, namely that Mr Mvubu was a single witness as against the appellant, as well as an accomplice. A reading of

[3] *Makhubela v S; Matjeke v S* [2017] ZACC 36; 2017 (12) BCLR; 2017 (2) SACR 665 (CC) para 29.
[4] *Nndwambi v S* [2018] ZASCA 99 para 3. See also Du Toit *et al Commentary on the Criminal Procedure Act* para 23-22 J.

the judgment reveals that the high court failed to exercise the caution it was enjoined to do in evaluating Mr Mvubu's evidence. It is a widely acknowledged rule that the evidence of an accomplice should be treated with extreme caution.[5]

[29] The contradictions in all three statements made by Mr Mvubu and his testimony, which are obviously material, should have alerted the high court to be on its guard and find Mr Mvubu to be an untrustworthy witness. Being a single witness, the high court ought to have found Mr Mvubu's evidence to be unsatisfactory.

[30] The only other evidence that implicated the appellant was the confession by Mr Ngomane marked exhibit 'D', in which the Mr Ngomane stated that he was recruited by Mr Mvubu to partake in the killing of the deceased. Other than being clearly inadmissible in terms of s 119 of the CPA, and on the basis of the case authority referred to earlier, this was hearsay evidence not corroborated by any other evidence.

[31] In light of what I have stated above, the appellant's conviction was improper and falls to be set aside. The appellant's conviction has also been attacked on other bases, for example, that the appellant never received a fair trial as *inter alia*, the trial judge unnecessarily entered the arena by subjecting the appellant to unfair cross-examination. I see no reason to delve into the other complaints having already found that the conviction must be set aside.

[5] *Mulaudzi v S* [2016] ZASCA 70 para 11.

[32] In the circumstances, I make the following order:

1 The appellant's application for condonation for the late filing of her notice to appeal, is granted.

2 The respondent's application for condonation for the late filing of the respondent's heads of argument, is granted.

3 The appeal is upheld. The appellant's conviction for murder is set aside, and the order of the high court is replaced with the following order:
'Accused 2 is found not guilty of murder as charged and is acquitted.'

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B H MBHA

JUDGE OF APPEAL

Appearances:

For appellant:	C G Jordaan
Instructed by:	Coert Jordaan Attorneys Inc, Nelspruit
	Giorgi & Gerber Attorneys, Bloemfontein
For respondent:	M R Molatudi with C V Mkhulise
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein