THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 821/2015

In the matter between:

THANDI SHERYL MAQUBELA **APPELLANT**
(Accused 1 in the Court a quo)

and

THE STATE **RESPONDENT**

Neutral citation: *Maqubela v The State* (821/2015) [2017] ZASCA 137 (29 September 2017)

Coram: Ponnan, Leach, Tshiqi, Swain JJA and Ploos van Amstel AJA

Heard: 15 August 2017

Delivered: 29 September 2017

Summary: Murder – cause of death – expert medical evidence – scientific and judicial measures of proof – erroneous application of scientific measure by trial court – cause of death inconclusive – application of judicial measure – probable cause of death – natural causes – determination of guilt – evidence of guilty conduct and mendacity – unlawful killing not the only reasonable inference to be drawn.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Murphy J sitting as court of first instance):

1 The appeal is upheld.

2 The conviction and sentence of the appellant, Thandi Sheryl Maqubela, on count 1 are set aside and replaced by:

'On count 1, the charge of the murder of Mr Patrick Ntobeko Maqubela, accused number 1 is found not guilty and discharged.'

JUDGMENT

Swain JA (Ponnan, Leach and Tshiqi JJA and Ploos van Amstel AJA concurring):

[1] The appellant, Ms Thandi Sheryl Maqubela, was found guilty by the Western Cape High Court (Murphy J) of murdering her husband, Patrick Ntobeko Maqubela, (the deceased) on count 1, as well as the forgery of a document purporting to be the will of the deceased on count 2, and the resultant fraud perpetrated upon the deceased's estate, on count 3. The appellant was sentenced to 15 years' imprisonment on count 1 and three years' imprisonment on each of counts 2 and 3, with the sentences on counts 2 and 3 being ordered to run concurrently with each other. In the result, the appellant was sentenced to an effective term of 18 years' imprisonment. The appellant's erstwhile co-accused, Mr Vela Mabena, who was only charged with the count of murder, was found not guilty and discharged. The appeal, only against her murder conviction, is with the leave of Murphy J.

[2] The appellant pleaded not guilty to all of the charges and denied that she had murdered the deceased, whether by suffocation as alleged by the State, or by any other means. The defence was, in effect, that the deceased must have met his death as a result of natural causes. Expert medical evidence as to the cause of death of the deceased, as well as evidence that revealed 'guilty consciousness' on the part of the appellant as to how the deceased died, as well as the appellant's mendacity, were the central themes that ran through the judgment of Murphy J.[1]

[3] The appellant challenges her murder conviction on the following grounds:

'(a) The trial Court found that comprehensive medical evidence about the deceased's *post-mortem* condition did not exclude the reasonable inference of sudden death by reason of cardio-pathology (ie, a natural death). In other words, the medical evidence did not establish that the *actus reus* of murder had been committed.

(b) Nonetheless, by relying on the appellant's considerable, demonstrated mendacity, the trial Court found that she had by unknown (and medically undetectable) means caused the death of the deceased.

(c) In making the aforesaid finding, the trial Court relied substantially on the minority judgment of Malan JA in *R v Mlambo* 1957 (4) SA 727 (AD). That *dictum* was said to entail that when an accused's lies betray a consciousness of guilt, they may be construed as admissions against interest and thus as independent evidence against her. Upon this view, the appellant's demonstrated mendacity was regarded as independent (circumstantial) evidence proving that the *actus reus* of murder had occurred.'

[4] As regards the medical evidence, the finding by the trial court that '[i]t is indisputable that an inference of sudden death by reason of cardio pathology would be consistent with the proven medical facts' was logically inconsistent with the trial court's subsequent finding, that the medical evidence was inconclusive as to the cause of death. This inconsistency is only explicable on the basis that the trial court

[1] The judgment of Murphy J is reported *S v Maqubela & another* 2014 (1) SACR 378 (WCC).

failed to appreciate the distinction between the judicial measure of proof, being the assessment of probability and the scientific measure of proof, being scientific certainty, in determining whether a cause of death had been established on the medical evidence. This led the trial court to the erroneous conclusion that the medical evidence was 'inconclusive' as to the cause of death. This conclusion shows that the inappropriate scientific measure of proof ie scientific certainty, was applied to the expert medical evidence.

[5] In *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* 2001 (3) SA 1188 (SCA) para 40, the important distinction to be drawn between the scientific and judicial measures of proof when assessing expert scientific evidence, was emphasised:

'Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D - E that:

"[O]ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence."'

The scientific measure of proof is the ascertainment of scientific certainty, whereas the judicial measure of proof is the assessment of probability.

[6] The trial court carried out a painstaking and detailed examination of the conflicting expert evidence of Dr Mfolozi, a specialist pathologist called by the State, and Professor Saayman, a specialist pathologist called by the appellant, as to the cause of death of the deceased, but unfortunately failed to appreciate the distinction

between the two measures of proof, whilst doing so. In the result, the trial court at times inadvertently applied the scientific measure of proof to the medical evidence, that of scientific certainty, and at other times applied the judicial measure of proof, being the assessment of probability.

[7] As a result of this erroneous approach, the trial court failed to appreciate that the opinion of Professor Saayman that an inference of 'death by natural causes or other undetected unnatural causes' and an inference of suffocation were 'equally possible', was formulated by him in the context of the scientific measure of proof, namely scientific certainty. The same is true of the trial court's further finding that, 'both experts accepted that a finding of suffocation would be consistent with the proved facts, as would be a finding of death by other unknown unnatural causes or of death by natural causes. . .'. These opinions were formulated in terms of the scientific measure of proof.

[8] In concluding that Professor Saayman 'did not state definitively what might have been an operative natural cause', the trial court again failed to appreciate that this was only true if the scientific measure of certainty was applied to the medical evidence. If the judicial measure of proof was applied, namely what the probable cause of death was, Professor Saayman was of the view that natural causes as the cause of death was the more probable inference to be drawn because 'there was a substantially greater likelihood' that the pathology in the deceased's heart 'could have caused his death' and that 'the probabilities are that his heart killed him'. His final conclusion was that, 'I come to the conclusion that a doctor or a pathologist should first and foremost consider, from a probability perspective, natural causes as being the cause of death in this particular case'.

[9] The trial court's conclusions that 'ultimately then, the cause of death cannot be determined by the medical evidence alone' and 'the medical evidence regarding the cause of death, in the final analysis, is inconclusive' were again the result of a failure to appreciate that these conclusions were the product of the application of the incorrect scientific measure of proof, namely scientific certainty, to the medical evidence.

[10] This erroneous conclusion that the medical evidence was inconclusive, was also the product of a failure by the trial court to appreciate that a number of the findings it made were the result of the correct application of the judicial measure of proof to the medical evidence. The finding of the trial court that, '[i]t is indisputable that an inference of sudden death by reason of cardio pathology would be consistent with the proven medical facts' implies an acceptance of the opinion of Professor Saayman that the pathology present in the deceased's heart was a probable cause of the deceased's death, as a result of the application of the judicial measure of proof. It also implies an acceptance of the concession by Dr Mfolozi that he could not exclude focal viral myocarditis of the heart, as a cause of death.

[11] In addition, the trial court applied the judicial measure of proof in concluding that it was 'a reasonable inference' and 'reasonably' possible that death was the result of natural causes, in the following excerpts from the judgment:

'The question arising from the medical evidence therefore is whether *the inference of a sudden death by natural causes may be excluded as a reasonable inference* having regard to the evidence overall, in particular by adequate proof of death by unnatural causes founded on other non-medical evidence.' And;

'A factual inference that death was reasonably possibly a result of natural causes can be dislodged by proof based on non-medical evidence that an unnatural cause of death was certain (beyond doubt) allowing no other alternative reasonable hypothesis. . .' (Emphasis added).

[12] A later passage in the judgment, read in the context of these conclusions is instructive:

'The ultimate factual issue in this case, therefore, (suicide or accident not having been alleged), is whether the non-medical facts exclude death by natural causes.'

To formulate the 'ultimate factual issue' in this manner, ie whether death by natural causes is excluded by 'non-medical facts', inevitably involves an acceptance by the trial court that the medical facts supported the inference that it was reasonably possible that death was the result of natural causes.

[13] The inadvertent application of the scientific measure of proof to the medical evidence, which produced an inconclusive answer as to the cause of death, had the serious consequence that the trial court failed to recognize that the opinion of Professor Saayman that the deceased probably died of natural causes, was the correct finding, when the judicial measure of proof was applied to the medical evidence.

[14] The opinion of Professor Saayman that natural causes were the probable cause of death of the deceased is based upon objective medical facts, sound logical reasoning and accords with the probabilities as revealed by the medical evidence. By contrast, Dr Mfolozi's opinion that natural causes as the cause of death were excluded by all of his post-mortem findings is not based upon logical reasoning. Dr Mfolozi also conceded that as he had not taken sections of all of the heart of the deceased, he could not say with 100 per cent certainty that focal viral myocarditis, which in extreme cases could be fatal, could be excluded. He conceded it was possible that he may have missed this condition due to the fact that a particular part of the heart which was affected, had not been examined.

[15] The conclusion that the deceased probably died of natural causes is the decisive answer to what the trial court regarded as the 'pivotal question for decision', namely:

'. . . whether the proved facts in this case, making up a concatenation of probable and certain conduct showing consciousness of guilt on the part of Accused 1, *in the absence of proof of a probable or certain cause of death*, are sufficient to infer murder beyond reasonable doubt in the sense that the proved facts exclude every reasonable inference from them save the inference of murder.' (Emphasis added).

[16] Quite clearly, 'the absence of proof of a probable or certain cause of death', was regarded by the trial court as an essential element in answering 'the pivotal question' in order to justify an inference of proof of murder beyond reasonable doubt being drawn, based solely upon the conduct of the appellant 'showing consciousness of guilt'. If the trial court had applied the appropriate judicial measure of proof to the evidence of Professor Saayman, it would have concluded that the

deceased probably died of natural causes. Accordingly, the answer to the trial court's 'pivotal question for decision' should have been that proof of natural causes as a probable cause of death, precluded a finding of murder.

[17] I should mention that the trial court in applying the rules of inferential reasoning formulated in *R v Blom* 1939 AD 188 at 202-203, correctly stated that before an inference of murder could be drawn, the proved facts being 'consciousness of guilt' on the part of the appellant, would have to exclude every other reasonable inference save the inference of murder. However, the primary rule of inferential reasoning is that an inference of murder must be consistent with all the proved facts. Even if the mendacity and guilty consciousness of the appellant are taken into account, in the light of Professor Saayman's evidence an unlawful killing is not the only reasonable inference that can be drawn.

[18] In the result, the legal issue of whether the trial court erred in its reliance upon the minority judgment of Malan JA in *R v Mlambo* 1957 (4) SA 727 (AD) in concluding that the evidence of the appellant's 'consciousness of guilt' could, in the absence of any other evidence, prove an unlawful killing beyond a reasonable doubt, need not be considered.

[19] Counsel for the appellant conceded that if it had been shown that the deceased had not died of natural causes, the mendacity and actions of the appellant after the event were such that her guilt would have been established. But in the light of the evidence that he probably died as a result of natural causes, an inference of an unlawful killing cannot reasonably be drawn. Accordingly, the trial court incorrectly relied upon the evidence of guilty conduct on the part of the appellant, without more, to prove the guilt of the appellant. In the result, the appeal against the conviction of murder must succeed.

[20] The following order is made:

1 The appeal is upheld.

2 The conviction and sentence of the appellant, Thandi Sheryl Maqubela, on count 1 are set aside and replaced by:

‘On count 1, the charge of the murder of Mr Patrick Ntobeko Maqubela, accused number 1 is found not guilty and discharged.’

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	S Rosenberg SC (with T R Tyler) Instructed by: Lamprecht Attorneys, Cape Town Symington & De Kok Attorneys, Bloemfontein
For the Respondent:	B E Currie-Gamwo Instructed by: Director of Public Prosecutions, Cape Town Director of Public Prosecutions, Bloemfontein