THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 494/2016

In the matter between:

DONOVAN MAZINA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Mazina v The State* (494/2016) [2017] ZASCA 22 (24 March 2017)

Coram: Ponnan, Zondi and Mathopo JJA and Nicholls and Coppin AJJA

Heard: 15 February 2017

Delivered: 24 March 2017

Summary: Evidence: sufficiency of: statement in terms of s 115 of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from Eastern Cape Division of the High Court, Grahamstown (Beshe and Majiki JJ sitting as court of appeal):

The appeal succeeds. The appellant's conviction and sentence imposed pursuant thereto are set aside.

JUDGMENT

Zondi JA (Ponnan and Mathopo JJA concurring):

[1] The appellant appeared in the regional court, Kirkwood, on a charge of murder read with s 51(2) of the Criminal Law Amendment Act 105 of 1997. He was alleged to have killed one Jeremy Swartbooi (the deceased) on 14 April 2012 by stabbing him with a knife. The appellant pleaded not guilty to the charge. In support of his plea of not guilty, he made a statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the Act) in which he stated that he had stabbed the deceased only once with a knife but contended that he had acted in self-defence. He was convicted and sentenced to 15 years' imprisonment.

[2] The appellant appealed against his conviction and sentence to the Eastern Cape Division, Grahamstown (Beshe and Majiki JJ). That court dismissed the appeal against conviction, but upheld the appeal against sentence. It set aside the sentence imposed by the trial court and replaced it with a term of 10 years' imprisonment. The appeal against conviction is with the special leave of this Court.

[3] The State case was based on the evidence of two witnesses, namely Mr Johnny Visagie (Visagie) and Mr Andile James Tyokela (Tyokela), both of

whom did not witness the actual stabbing of the deceased. Moreover Tyokela was not even present when a verbal altercation between the deceased and the appellant occurred.

[4] According to Visagie, who was in the company of the appellant and the deceased shortly before the fatal incident occurred, the appellant and his friend Wayne were smoking an 'okka pipe' outside the tavern. The deceased arrived and asked them if he could smoke the pipe. The appellant told him to wait for his turn. The deceased, it would seem, did not take kindly to being told to wait. He taunted the appellant, calling him a 'gans'. This resulted in a verbal altercation between the deceased and the appellant. The deceased's friends restrained the deceased when he approached the appellant. Realising that a fight was about to occur, Visagie and his friend decided to go inside the tavern. Up to that point, Visagie did not see any weapon on either of the two. The deceased appeared to be intoxicated. Visagie only learnt later that the deceased had been stabbed and had been removed to hospital.

[5] The evidence adduced by two State witnesses did not advance the State case. The appellant did not testify in his defence. What remained was his statement in terms of s 115[1] read together with the formal admissions under s 220 of the Act. To the extent relevant his s 115 statement provides:

'6. Ek erken dat ek die oorledene een (1) keer met 'n mes gesteek het, toe hy my wou aanval, omdat ons vroeër in 'n mondelingse stryery betrokke was.

[1] Sections 115(1) and (2) provide as follows:
'(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding Judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.
(2)*(a)* Where the accused does not make a statement under ss (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.
(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under ss (1) or this sub-section, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under s 220.'

7. Ek het op daardie stadium eerlikwaar geglo dat my lewe in gevaar was en/of dat ek ernstige liggaamlike leed sou opdoen.

8. Ek voer aan dat ek myself verdedig het.

9. Ek ontken dat my optrede wederregtelik was.

10. Na die steekwond toegedien is, het die oorledene omgedraai en die toneel verlaat.

11. Ek het later verneem, en ek aanvaar dit as korrek, dat die oorledene dood is as gevolg van die een (1) steekwond wat ek hom toegedien het.'

[6] The basis of the trial court's finding was the following:

'Die erkennings wat aan die hof gemaak is voor die tyd het dit alles erken wat daar gebeur het, dat daar onderskeidelik dan volgens die pleitverduideliking 'n rede was waarom hy die oorledene se dood veroorsaak het naamlik dat hy in selfbeskerming opgetree het deurdat hy geglo het volgens die pleitverduideliking dat sy lewe in gevaar was, dat hy ernstige liggaamlike leed sou opdoen. Dit is dus gemenesaak beskuldigde het op die tyd en plek gemeld in die klagstaat hy het die oorledene se dood veroorsaak deur hom een hou met die mes in die nek te steek wat gelei het tot sy dood as gevolg van die wond wat beskryf word in the bewysstuk "C" voor die hof, die geregtelikedoodsondersoek.'

[7] The trial court went on to state the following:

'Die natuurlike gevolg van 'n handeling is normaalweg dat dit wat intree was bedoel om in te tree. In hierdie geval is 'n meswond deur die beskuldigde toegedien aan die nek van die oorledene, dit het tot sy dood gelei. Ek kan nie 'n ander afleiding maak as dat hy die bedoeling gehad het en die gevolg wat ingetree het te bewerkstellig nie. Sonder om sy weergawe te oorweeg is daar nie 'n weergawe anderste as die natuurlike gevolg sal intree as 'n persoon 'n sekere handeling uitvoer nie. By gevolg het hy die opset gehad om die oorledene se dood te veroorsaak, en vind ek hom SKULDIG op die aanklag van moord soos aangekla.'

[8] On appeal the court below endorsed the findings of the trial court and confirmed the conviction. It held that it was common cause during the trial that

the appellant admitted in terms of s 220 that he had stabbed the deceased and that the deceased died as a result of the stab wound. The court below reasoned that given that it is unlawful to kill a person, the appellant's admissions amounted to prima facie proof of the fact that the appellant murdered the deceased and that required him to place some evidence to support the existence of his defence.

[9] In my view, the court below misdirected itself. After the s 115 statement had been received into evidence, Mr Diedrich, who was representing the appellant, intimated that the latter was willing to make certain formal admissions. In that regard the record reads:

'Edelagbare daar is verder ook die normale 220 erkennings wat deur die beskuldigde gemaak is. Aangeheg is ook die lykskouingsverslag. Wil die hof dat ek dit ook inlees in die rekord?

Hof: Asseblief ja.

Mnr Diedrich: Erkennings in terme van art. 220 van Wet 51 van 1977. Die beskuldigde maak hiermee die volgende erkennings, dat die oorledene tydens sy leeftyd Jeremy Swartbooi was, dat hy korrek geidentifiseer is as die person genoem in die klagstaat. Dat die oorledene op 14 April 2012 as gevolg van 'n steekwond aan die nek oorlede is. Dat die oorledene geen verdere beserings opgedoen het vanaf die verwydering van die toneel totdat Dr. Jan Antonie de Beer op 17 April 2012 'n nadoodseondersoek op sy liggaam uitgevoer het nie. Dat die inhoud van die post mortem verslag asook die korrektheid en bevindings daarvan erken word as bewysstuk. Dit is dan geteken ook deur die beskuldigde op vandag se datum sowel as ekself. Ek wens ook dit in te handig by die Agbare Hof as verdere bewysstuk.

Hof aan beskuldigde: Mnr Mazina bevestig u dan die inhoud van die verklaring uitgelees wat waarskynlik u handtekening het wat u ook geparafeer het dat dit korrek is? . . . – Ja

Ek merk dit dan as bewysstuk "A" in die verrigtinge. Die formele erkennings wat u daarin maak sê u, u is bereid dat die hof dit so erken. Soos wat die ander erken word, word dit dan in terme van art. 220 genotuleer as erkennings wat u gemaak het, met ander woorde die staat hoef dit nie te bewys nie u erken dit. Dan word die ander dokument ook ontvang, bewysstuk "B" en in dit word verwys na bewysstuk "C", die verslag, die nadoodseondersoek, met die erkennings vooraf gemaak. U bevestig dit ook as korrek. - - - Ja.

U kan dan maar sit meneer die saak gaan op daardie basis voort.'

[10] It is immediately apparent that the formal admission 'die oorledene op 14 April 2012 as gevolg van 'n steekwond aan die nek oorlede is', differs markedly from the statement made by the appellant during the s 115 proceedings. The material portion of his s 115 statement provides: 'Ek erken dat ek die oorledene een (1) keer met 'n mes gesteek het, toe hy my wou aanval, omdat ons vroeër in 'n mondelingse stryery betrokke was'. The s 220 admission is in the passive voice. There is thus no formal admission by the appellant to the effect that he did anything, much less that he had stabbed the deceased. Given the quality of the evidence adduced by the State and absent a formal admission by the appellant, there was simply no basis for a conviction. In fact the State appreciated as much when he informed the trial court that the appellant must be found not guilty.

[11] I have read the judgment prepared by Coppin AJA. My colleague states (para 19): 'But for erroneously describing the admissions as formal admissions before noting them as such, the Magistrate, otherwise, acted correctly in terms of s 115(2)(*b*) of the Act'. With respect to my learned colleague that erroneous description goes to the heart of the matter. For, it is upon that erroneous description and the conceptual confusion it causes that the conviction is founded. An admission in terms of s 220 constitutes sufficient proof of the fact to which it has reference. Where it has such cogency the State is relieved of the burden of adducing evidence concerning that particular fact. An accused is not obliged to consent to a formal admission being recorded as such. Where he does not so consent, the onus remains on the State to prove by admissible evidence all the facts which were put in issue by a plea of not guilty. In this case both the trial court and the court below wrongly regarded the appellant's statement in his s 115 plea explanation as an admission of fact under s 220 of the Act. It was not. The onus thus remained on the State to adduce admissible evidence concerning the stabbing of the deceased. That, the State failed to do. A conviction could accordingly not follow.

[12] In the result the appeal succeeds. The appellant's conviction and

sentence imposed pursuant thereto are set aside.

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D H Zondi
Judge of Appeal

Coppin AJA (Nicholls AJA concurring):

[13] I have had the benefit of reading the judgment prepared by my colleague Zondi JA. For the reasons set out herein I am not able to agree with the reasoning and conclusion reached in that judgment. A fundamental point on which I differ with my colleague is whether the trial court incorrectly regarded the admissions made by the appellant, in his s 115 of the Criminal Procedure Act 51 of 1977 (the Act) plea explanation, as formal admissions of fact as contemplated in s 220. I am of the view that the trial court did not err in that regard for the reasons I shall briefly traverse. Consequently, the appeal stands to be dismissed.

[14] At the outset of the trial the appellant, who was legally represented, made a written statement in terms of s 115 of the Act in which he indicated that he was pleading not guilty to the charge of murder. In the statement he admits that he was in the presence of the deceased on the date the incident occurred, i.e. 14 April 2012. He further admits that he stabbed the deceased once with a knife and accepted that the deceased died as a result of a stab wound inflicted by him.

[15] In the statement he raises self-defence as a justification for the stabbing. He states that he and the deceased earlier had an argument and that the deceased wanted to attack him. He further states that he genuinely believed that his life was in serious danger and that he was going to suffer serious bodily harm. He specifically denied that in stabbing the deceased and causing his death he acted unlawfully.

[16] Of significance is that in the s 115 statement, he goes on to state the following concerning the admissions which he made:

'Ek stem toe dat die erkennings hierbo gemaak deur die Abgare Hof aangeteken mag word as formele erkennings. Maar behalwe vir sodanige erkennings plaas ek die Staat ten bewys van die ander elemente van die misdrywe my ten laste gelê.'

The appellant confirmed his s 115 statement and it was admitted as 'Exhibit A'.

[17] The State also produced a written document of other admissions made by the appellant in terms of s 220 of the Act, relating to the identity of the deceased, the cause of death and the chain from the time of the deceased's fatal injury to the post-mortem examination conducted on his body and also relating to the post mortem report itself. This written document was admitted as 'Exhibit B' and the post- mortem report as 'Exhibit C'.

[18] The record reflects that the Magistrate then engaged the appellant as follows regarding his s 115 statement ('Exhibit A'):

'Ek merk dit dan as Bewysstuk "A" in die verrigtinge. Die formele erkennings wat u daarin maak sê u, u is bereid dat die hof dit so erken. Soos wat die ander erken word, word dit dan in terme van art. 220 genotuleer as erkennings wat u gemaak het, met ander woorde die Staat hoef dit nie te bewys nie u erken dit.'

[19] The appellant agreed to this, and further agreed to the correctness of 'Exhibit B' and 'Exhibit C'. But for erroneously describing the admissions as formal admissions before noting them as such, the Magistrate, otherwise, acted correctly in terms of s 115(2)(*b*) of the Act.[2] There is no indication on the record that the appellant, who was legally represented, did not understand

[2] '(2)*(a)* Where an accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.
(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.'

what admissions the Magistrate was referring to, but clear indication to the contrary.

[20] There can, therefore, be no doubt as to what the appellant formally admitted. The only element of the crime of murder that the appellant put in issue was that of unlawfulness. The effect of the formal admissions made by the appellant was that the State did not have to adduce evidence to prove the facts formally admitted.[3]

[21] The State then proceeded to adduce the evidence of two witnesses, Mr Johnny Visagie (Visagie) and Mr Andile James Tyokela (Tyokela), who were present at the tavern where the fatal stabbing of the deceased took place on 14 April 2012. The two witnesses testified concerning the peripheral circumstances of the stabbing, but did not witness the actual stabbing and the events that immediately preceded it. Their evidence was very brief.

[22] Visagie admitted that he had not been sober at the time of the incident and that he was at Porsha tavern (the tavern) in Aquapark, Kirkwood, on 14 April 2012, just before 22h00. He and his friend, Frederick, were smoking an 'okka pipe' when they were approached by the appellant and his friend, Wayne, and they requested to also smoke the pipe. Visagie knew the appellant through friends. The appellant and his friend smoked the pipe, after Visagie and his friend had finished. The deceased arrived and asked the appellant whether he could also smoke the pipe. The appellant told him to wait a 'minute'.

[23] According to Visagie, the deceased was drunk and had tattoos on his arm. Apparently offended by the appellant's response to his request, the deceased then started taunting the appellant, calling him 'gans'. Visagie testified that the deceased was restrained by his friends, and that it is at that stage that he realised that 'trouble' was imminent, and on his recommendation, he and his friend, Frederick, left the scene and went into the

[3] *S v Sesetse en 'n ander* 1981 (3) SA 353 (A) at 374.

tavern. When Visagie was pointedly asked in cross-examination whether the appellant's plea of self-defence was true, Visagie pleaded ignorance. He answered as follows:

'. . . Ek sal nou nie weet nie, ek het nie gesien dat hy steek hom nie so ek kan nie 'n ding in die hof gaan praat wat ek nie van weet nie. Dan lieg ek vir myself en ek lieg vir die hof mos nou.'

[24] Tyokela's evidence was no better. He prefaced his evidence by stating, in effect, that he did not know who stabbed the deceased. He testified that he saw the deceased standing at the gate where a large group were smoking an 'okka' pipe. He then saw the deceased running towards the tavern and that blood was coming from the deceased's neck. The deceased ran to a tap and then onto the road, where he subsequently collapsed next to a 'danger box'. Tyokela readily conceded that he did not witness the stabbing incident.

[25] After Tyokela's evidence, the State closed its case. The appellant's case was closed his case without him testifying, or calling any witnesses. The appellant's representative was apparently content with the State's closing argument, that due to the lack of evidence and in light of the appellant's plea explanation that he had acted in self-defence, the appellant ought to be given the benefit of the doubt and acquitted.

[26] Notwithstanding those submissions, the Magistrate found that the evidence before him was sufficient and convicted the appellant of the murder of the deceased. The basis of the appellant's appeal in the court below was that the evidence of the State was circumstantial, and that the magistrate erred in concluding that the only reasonable inference to be drawn from the proven facts is that the killing of the deceased was unlawful. Particularly, because the appeal was based on the fact that the appellant had raised self-defence as justification in his plea explanation, and because the State bears the onus to prove the guilt of the appellant beyond a reasonable doubt, while the appellant bore no onus to prove his innocence.

[27] The court below found that the appellant had a case to answer and that his failure to give evidence sealed his fate. As to whether the State had, notwithstanding the shortcoming of the evidence of the State witnesses, discharged its onus, the court below (Beshe J) stated:

'It became common cause during the trial that [the] deceased died as a result of having been stabbed by the appellant. The appellant made an admission in this regard in terms of Section 220 of the Act, thereby placing this fact beyond issue. Given that it is unlawful to kill another; in my view this amounted to prima facie proof that he murdered the deceased. Although there was no obligation on the appellant to prove the defence he had raised in his plea explanation, the fact that there was a prima facie case against him required that he places some evidence to support the existence of the defence he relies upon before court. By failing to do so he ran the risk of the court concluding on the available evidence, that the prosecution had discharged its burden of proof beyond reasonable doubt…'

[28] Having correctly found that the appellant's plea explanation, and what had been put to the State witnesses, could not be taken into consideration as evidence on oath, the court below concluded that there was no evidence under oath supporting the appellant's plea of self-defence and that he had been correctly convicted by the trial court. In my view, the reasoning and conclusion of the court below, including that which relates to the formal admissions made by the appellant, cannot be faulted.

[29] It is trite that where there is prima facie evidence implicating an accused in the commission of a crime, there is an evidentiary burden imposed on him and evidence, sufficient to give rise to a reasonable doubt, is required to prevent a conviction.[4] If the accused does not adduce such evidence he runs the risk of being convicted.

[30] At the close of the State case the trial court had before it the evidence of the two witnesses, albeit peripheral to the stabbing. It also had before it the

[4] *Scagell and others v Attorney-General, Western Cape & others* 1997 (2) SA 368 (CC) para 12; *Osman & another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) para 22; *S v Boesak* 2001 (1) SA 912 (CC) para 24.

formal admissions made by the appellant, inter alia, that he had stabbed the deceased intentionally and that the deceased had died as a result. In circumstances where there was no evidence given under oath indicating that the appellant acted in self-defence, this constituted prima facie evidence implicating the accused in the commission of the offence and the appellant had an evidentiary burden to adduce evidence which was sufficient to create a reasonable doubt about whether he had indeed acted in self-defence. This did not imply that he had an onus to prove his innocence. The State still bore the onus to prove his guilt beyond a reasonable doubt.[5]

[31] The failure of the appellant to adduce the necessary evidence under oath strengthened the State case and, what was only prima facie proof, became proof beyond a reasonable doubt.[6]

[32] In this court the appellant's legal representative submitted in his heads of argument, essentially, that everything that the appellant stated in his s115 statement, *both* unfavourable and favourable (i. e., including his explanation that he acted in self-defence), was part of the formal admissions he made. Furthermore, that the effect thereof, so it was argued, was to create reasonable doubt as to whether the appellant had acted in self-defence; and that the appellant ought to have been given the benefit of the doubt and acquitted. Those submissions are without merit. A formal admission can only be made in respect of unfavourable facts and must be an admission, properly so called.[7] The appellant's statement that he acted in self-defence, squarely put in issue the unlawfulness of his conduct and cannot possibly be regarded as an admission of what the State was required to prove.

[33] The appellant also relied on what was held in *S v Cloete*,[8] namely, that the exculpatory parts of a plea explanation, made in terms of s115 of the Act,

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[5] DT Zeffertt and AP Paizes *The South African Law of Evidence* 2nd ed. (2009) at 120-129 and the cases cited therein.
[6] *S v Mthetwa* 1972 (3) SA 766 (A) at 769D - 770B.
[7] See Du Toit, et al (eds) *Commentary on the Criminal Procedure Act* (1987) at 18-11/18-12*;* *S v Kuzwayo* 1964 (3) SA 55 (N) at 57A; *S v Dingoos* 1980 (1) SA 595 (O) at 596G-597C.
[8] *S v Cloete* 1994 (1) SACR 420 (A).

was evidential material that should not to be ignored. Even though the exculpatory part of a plea explanation may not be ignored in determining, at the end whether, in light of all the evidence, the State had discharged its onus, it did not have to be given any weight as it was not repeated under oath and the State had had no opportunity to test it in cross-examination.[9] Accordingly, the court below cannot be faulted in its approach to the appellant's plea explanation and its ultimate conclusions concerning it.

[34] In the result I would dismiss the appeal.

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P Coppin

Acting Judge of Appeal

[9] *S v Van Niekerk* 1972 (3) SA 711 (A) at 723B; *S v Cloete* (*supra*) at 428b-g.

APPEARANCES:

For appellant:	H Bakker
	Instructed by:
	Shaun Masimla Attorneys, Port Elizabeth
	Symington & De Kok Attorneys, Bloemfontein
For respondent:	D Els
	Instructed by:
	The Director of Public Prosecutions, Grahamstown
	The Director of Public Prosecutions, Bloemfontein