THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 803/21

In the matter between:

EARL CRAIG CLASSEN **FIRST APPELLANT**

ELLISTER ALFREDO JANSEN **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Classen & Another v The State* (803/21) [2022] ZASCA 130 (03 October 2022)

Coram Makgoka and Mabindla-Boqwana JJA and Musi, Makaula and Goosen AJJA

Heard: 17 August 2022

Delivered: 03 October 2022

Summary: Criminal Law and Procedure – hearsay evidence – s 3(1)(*c*) of Law of Evidence Amendment Act 45 of 1988 – admissibility, assessment and probative value of previous inconsistent statement by a hostile witness.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mudau J sitting as a court of first instance)

1 The appeal is upheld.

2 The order of the high court convicting the appellants, and the resultant sentences, are set aside and replaced with the following:

'Both accused are acquitted on all three counts.'

JUDGMENT

Musi AJA (Makgoka and Mabindla-Boqwana JJA and Makaula and Goosen AJJA concurring):

[1] This appeal, which is with the leave of this Court, is against the appellants' conviction in the Gauteng Division of the High Court, Johannesburg (the high court). They were convicted of murder (count 1), unlawful possession of a firearm in contravention of s 1 of the Firearms Control Act 60 of 2000 (count 2) and unlawful possession of ammunition in contravention of s 90 of the Firearms Control Act 60 of 2000 (count 3). They were each sentenced to life imprisonment for the murder count and to five and two years' imprisonment respectively, on counts two and three. The appellants' convictions rested largely on a recanted statement by a witness who was declared hostile. The appeal turns on the evidentiary weight to be attached to that statement.

[2] It was not in dispute that the deceased, Mr Daniel Emmanuel Smith was shot four times and killed on 18 May 2017, at Ennerdale. The two appellants were arrested for the murder and related counts. They pleaded not guilty to all the counts. At the trial, the identity of the deceased's assailants was the only issue in dispute.

[3] The facts were as follows. Mrs Belinda Shortridge testified that on 18 May 2017 she was driving her car on Town Road, Ennerdale. There were two passengers in the car. Mr Daylen Wesley was seated on the front passenger seat and the deceased was seated behind her, on the right rear seat. As they approached a controlled intersection, she slowed down because the traffic light was red. She saw a blue Volkswagen Golf motor vehicle (the Golf), with two occupants, driving next to her - on her right-hand side. As she was about to stop at the intersection she saw the passenger, who was sitting in the left front seat of the Golf, pointing a firearm in the direction of her car. As she accelerated she heard a gunshot and noticed that the right rear window of her vehicle – where the deceased was sitting - was shuttered.

[4] She turned and stopped next to a taxi rank and jumped out of her car. She ran and took refuge behind a taxi. Mr Wesley ran and hid behind the bushes. The Golf stopped behind her car. She looked out from behind the taxi and saw the driver of the Golf alighting. He went to her car, opened the right rear door and thereafter she heard two gunshots. The driver walked back to the Golf and drove away. She walked back to her car and noticed that the deceased, who was still inside, had been shot. Although visibility was good, she did not recognise any of the occupants of the Golf.

[5] The prosecutor confronted her with a previous inconsistent statement which she had made two days after the incident. In the statement she stated that the two appellants were the persons who shot the deceased. She stated that the second appellant (Mr Jansen) was the driver of the Golf and that the first appellant (Mr Classen) was the passenger. She admitted that she made the statement freely and voluntarily. As a result of her recantation, the prosecutor successfully applied for her to be declared a hostile witness, in terms of s 190(2) of the Criminal Procedure Act 51 of 1977,[1] thus allowing the State to cross-examine her.

[1] Section 190(2) of the Criminal Procedure Act 51 of 1977 reads: ‘ any such party who has called a witness who has given evidence in any such proceedings (whether that witness is or is not, in the opinion of the court, adverse to the party calling him), may, after such party or the court has asked the witness whether he did or did not previously make a statement with which his evidence in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that he previously made a statement with which such evidence is inconsistent.’

[6] During cross-examination by the prosecutor, she testified that she mentioned the two appellants' names as a result of pressure brought to bear on her by the deceased's family members and friends. The community also wanted the assailants arrested. She knew both appellants well and testified that they were not at the crime scene. Her statement was admitted into evidence in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Amendment Act).

[7] Mr Daylen Wesley confirmed that he and the deceased were passengers in Mrs Shortridge's car and that the deceased was sitting on the right rear seat. He testified that Mrs Shortridge's car stopped at the traffic light and the Golf, with two occupants, stopped next to it. The passenger alighted from the Golf and fired two gun shots through the right rear passenger window. Mrs Shortridge drove off and stopped at a nearby taxi rank. He and Mrs Shortridge jumped out of the car and ran into different directions. He heard two more gun shots. After hearing the Golf drive away, he returned to Mrs Shortridge's car and noticed that the deceased was shot in his face. The police and ambulance arrived. The incident happened at about half past eleven in the morning. He could, initially, not identify the occupants of the Golf but later became aware that it was the two appellants.

[8] He testified that he made two statements about the incident. In his first statement, dated 20 May 2017, he stated that he could not identify the assailants. In his second statement, he mentioned the names of the two appellants. During cross-examination it transpired that his second statement was commissioned on 12 November 2018, a day before he testified. According to him, he made the statement on 22 May 2017. He testified that the reason why he mentioned the appellants in his second statement was because he heard their names being mentioned as the persons who might have been involved in the incident and could then put their names to the faces of the assailants. He further testified that the Golf was the second appellant's car and that he saw the registration letters and numbers of the car. It was WZM 070 GP.

[9] The first investigating officer until shortly after the appellants' arrest, Constable Ntombela testified that she arrested the two appellants on 22 May 2017 after they handed themselves over to her. She had visited the first appellant's parental home

where she informed his mother that he was a suspect in this case. She called Mrs Shortridge who arrived at the police station with Mr Wesley. She requested Mrs Shortridge to identify them, which she did. Mr Wesley was uncooperative and did not identify them. She confirmed that Mr Wesley made a statement about the incident on 20 May 2017 and stated that he could not identify the assailants. She also confirmed that her colleagues Constable Mokoena and Captain Chetty attended the scene on 18 May 2017 and that Mrs Shortridge did not mention the names of the appellants to any of them.

[10] Mr Alexander van Niekerk, a civil engineer in the employ of the South African National Road Agency as a manager for transportation, tolls and planning, investigated whether a car with registration details WZN 070 GP passed under the e-toll gantries, during the relevant period. He testified that when a vehicle passes a gantry three photographs (front, rear and top) of the car are taken. On 17 May 2017, a vehicle with those registration details passed a gantry on the N1 whilst driving from north to south near Soweto. On 18 May 2017, a vehicle with the same registration details drove under a gantry at 13:11:36, and under another gantry at 13:16:11. Both gantries are in the Crown Mines area, and capture vehicles driving north on the N1. There were two unidentifiable occupants in the vehicle.

[11] Mr Silron Shortridge, Mrs Shortridge's husband, testified that on 18 May 2017 he went to the scene where he spoke to his wife. She told him that the two appellants shot the deceased. A week after the incident one Mr Alfred Arendse approached him and his wife. He informed them that he was sent by the first appellant and his brother, Curtis. He asked them how much it would cost 'to sort out the case'. They told Mr Arendse that they did not want any money from them. Approximately four weeks thereafter one Mr John Adams visited them and said that he was sent to give them R5000 to repair their car and to apologise for what had happened. He informed them that he would retain R200 as commission and gave the balance (R4800) to Mrs Shortridge. During August 2018 he saw messages on his wife's phone relating to a meeting that was to be held between her, her friend Hazel, the first appellant and Curtis. On 25 November 2018 he discussed this with the deceased's uncle, Mr John Muller, and the latter accompanied him to the police station, where he made a

statement. It was apparent from Mr and Mrs Shortridge's testimonies that they were estranged although they lived in the same house.

[12] Mrs Shortridge was recalled as a witness, because her husband's statement was taken after all the state witnesses had testified. She denied that she was given money by Mr Adams. She also denied that she was present when Mr Arendse asked how much it would cost to 'sort out the case'. She also denied that she told her husband that the two appellants shot the deceased.

[13] This concluded the state's case. Both appellants testified in their respective cases. Both denied any involvement in the killing of the deceased. The first appellant owned a bottle store *cum* tavern in Ennerdale, which is situated approximately 200 metres from the scene of the shooting. The second appellant was employed at that business. It is common cause that both appellants and the deceased lived in the same community, and that there was bad blood between the appellants, on the one hand, and the deceased, on the other. During 2015 and 2017, respectively, the appellants laid two attempted murder charges against the deceased after the deceased had shot at them. The first appellant testified that on 18 May 2017 he arrived at his business at approximately 10:00, and remained there for approximately 45 minutes before he left. He saw the second appellant at his business premises. He denied having been at the scene of the incident or having been one of the occupants in the Golf.

[14] During cross-examination he was confronted with his cellular phone records, which showed that he left Constantia Kloof at 11:13 and arrived in Ennerdale at 11:56. The cellular phone records further showed that he left Ennerdale at 12:23. He accepted the veracity of the records but indicated that he was not sure of the times that he arrived and left Ennerdale. He testified that he was at work, on 18 May 2017, from approximately 10:00 until 02:00. He confirmed that his wife Mrs Tracy Toriani was the owner of the Golf but denied driving it on 18 May 2020.

[15] Mrs Toriani testified that she was the owner of the Golf. During the first week of May 2017 she lent the car to her brother. She was hospitalised for approximately 21 days. It was only after her discharge that she learnt of her husband's arrest. The investigating officer Sergeant Sithole visited her and asked her about the whereabouts

of the car and she told him that it was with her brother. She gave him her brother's cellular phone number and he called and spoke to her brother.

[16] That concluded the evidence before the trial court. I turn now to the central issue in the appeal i.e. whether the high court was correct in convicting the appellants on Mrs Shortridge's recanted statement. The high court admitted her statement in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act, as mentioned earlier. In *Makhala v The State,*[2] this Court said that:

'… [O]ur Hearsay Act allows for a more flexible discretionary approach to the admissibility of hearsay evidence than the common law did. In deciding whether hearsay should be admitted in the interest of justice, the court is not limited to the factors listed in s 3(1)*(c)*(i) to (vi) but empowered in terms of s 3(1)*(c)*(vii) to have regard to "any other factor which should in the opinion of the court be taken into account. . . ."[3]

Although the high court did not discuss the factors mentioned in s 3(1)*(c)*(i) to (vi),[4] I accept, for present purposes, that it properly exercised its discretion, in terms of s 3(1)*(c)*(vii), in admitting the statement in the interest of justice. I say this because, the high court found that Mrs Shortridge's statement on the identity of the assailants and the overall circumstances of the case, including the testimony of Mr Wesley, provided adequate assurances for the reliability of the statement. Further, that the spontaneous report to her husband at the scene was consistent with her statement. Consequently, it rejected the appellants' versions and convicted them.

[17] Before us, the appellants conceded that the statement was properly admitted, since Mrs Shortridge did not dispute that she made the statement freely and voluntarily. They, however, argued that the probative value or weight to be attached to the statement was not properly evaluated by the high court. They contended that

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[2] *Makhala and Another v The State* [2021] ZASCA 19; 2022 (1) SACR 485 (SCA); [2022] 2 All SA 367 (SCA).
[3] Ibid para 118.
[4] Section 3(1)*(c)* provides: 'the court, having regard to-
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

her testimony regarding the circumstances that led to her making the statement and the material contradictions in the State's case detracted from the weight to be attached to her statement.

[18] The probative value of Mrs Shortridge's statement is crucial to the determination of this appeal. This is so because her statement that the appellants were the assailants and their alibis are mutually destructive. Both versions cannot be true.[5] In *S v Ndhlovu*[6] this Court said:

'The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement be admitted notwithstanding its later disavowal or non-affirmation. . . .'[7]

The minority judgment in *Makhala* also underscored that:

'[T]he circumstances under which the statement was given will be relevant to an assessment as to whether it is likely that the declarant was telling the truth when making the statement. . . .'[8]

This statement is uncontroversial, and the majority had no issue with it.

[19] The high court found that: (a) the pressure put on Mrs Shortridge was to bring about justice and for investigations to commence; (b) it was not undue and there were no obvious threats or any kind of inducement; (c) the statement was given shortly after the incident; and (d) that she was frightened to look at the appellants and the public gallery in court.

[20] The high court chose Mrs Shortridge's recanted statement over her testimony despite her explanation for disavowing the statement. In my view, the high court attached too much weight to Mrs Shortridge's statement and consequently committed a misdirection. I say this for the following reasons: (a) it did not give proper consideration to the circumstances under which the statement was given; (b) it misconstrued Mrs Shortridge's testimony with regards to the pressure that was

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[5] *S v Liebenberg* 2005 (2) SACR 355 (SCA) para 15.
[6] *S v Ndhlovu* 2002 (6) SA 305 (SCA).
[7] Ibid para 31.
[8] *Makhala* fn 2 para 78.

brought to bear on her to implicate the appellants; (c) and it did not properly evaluate the impact of the testimonies of the other witnesses on the contents of the statement.

[21] Her statement was taken approximately 48 hours after the incident. She testified that she was traumatised and was not in a right state of mind after the incident. After the incident, before she made the statement, her house was 'bombarded' by the deceased's family and friends who told her what to say. The deceased's family members also told her that it could only be the appellants who were responsible for the deceased's death. The community knew about the bad blood between the deceased and the appellants. She told the police that it was the two appellants, based on speculation and rumours that abounded in the community insinuating their involvement.

[22] She testified that when she made the statement all that she had to do was put names to the two unknown assailants and bring justice to the deceased's family. As a result of the pressure, she mentioned the two appellants and assigned roles to each of them in her statement. Her testimony sums it up well:

'Look at the time of giving my statement, I was not by myself, I had a lot of pressure from both community, family members, and the State, due to the fact that it took me so long to give a statement because, I was confused as to who it actually was that I saw and hence I say the two people mentioned in here, the two suspects in the dock, Earl and Ellister, are not the two people that [committed] the offence on the day as I know them quite well, like I said. [There] was a lot of influence in identifying the suspects and a lot of pressure and I would say speculation because of the fact, as I mentioned here that Daniel Smith and Earl Classen did not see eye to eye because they had a [quarrel]. So actually I would like to say to the Court, if it was entirely up to me and I was a 100% uninfluenced, then I suppose we would not have had [any] suspects because I would not have known who to point out.'

[23] It is clear from her testimony that the statement was not made to ensure that justice prevailed but because of the unbearable pressure heaped on her shoulders. She was pressurised for two days to implicate the appellants. There was therefore clear evidence of pressure. She categorically stated that she was not afraid of the appellants. Given the above, there was no reason to reject Mrs Shortridge's testimony.

[24] The high court found that Mrs Shortridge spontaneously informed her husband at the scene who the assailants were. It accepted her husband's testimony regardless of the inherent improbabilities in his testimony when viewed in conjunction with the totality of the evidence. Mrs Shortridge did not inform Captain Chetty or Constable Mokoena, who spoke to her on the scene, about the identity of the assailants. Mr Shortridge was present, and if his wife had told him about the identity of the assailants, he would surely have raised this. He did not. When pressure was exerted on his wife to mention who the assailants were, he did not tell anyone, including the police, that his wife had told him who they were. Also, he did not mention this in his evidence-in-chief. This only came out in cross-examination.

[25] He had more than enough occasions to inform the police and the community what his wife would have conveyed to him at the scene. In my view, this negatively affects the credibility of his evidence on this aspect. He only mentioned that they were visited by Messrs Arendse and Adams in his statement which he made on 25 November 2018 – approximately one and a half years after the incident - when he was accompanied by the deceased's uncle, Mr Muller, to the police station. There was no explanation as to why he did not mention this to any person prior to November 2018. His testimony relating to the messages that he saw on the cellular phone that she was using does not take this matter further. In itself his testimony was unsatisfactory. Also, when considered in the light of the strained relationship between him and his wife, it was wholly unreliable.

[26] The high court found that Mr Wesley's testimony was unsatisfactory in some respects. It found, however, that his testimony was materially corroborated by Mrs Shortridge's statement. I disagree. In my view, Mr Wesley's testimony was untruthful, self-destructive and reconstructed. If anything, it corroborated Mrs Shortridge's version about the improper suggestions made and pressure brought to bear by the deceased's family members and friends. Mr Wesley made a statement on 20 May 2017, in which he made no mention of the identity of the assailants. On the contrary, he emphatically stated that he did not see who was in the Golf because everything happened so fast. On the day of the appellants' arrest, 22 May 2017, he accompanied Mrs Shortridge to the police station where she pointed out the appellants as the

assailants, but he did not. Instead, according to Constable Ntombela, he was uncooperative.

[27] In his second statement, which was commissioned on 12 November 2017, a day before he testified, he mentioned the names of the appellants. In his first statement he stated that one shot was fired at the deceased through the window and that two shots were fired at the Golf before it stopped. He, however, testified that the passenger of the Golf jumped out of the vehicle and fired two shots at the deceased. After he ran away he heard two further shots being fired. This was an obvious reconstruction. This is so because in his statement he mentioned three gunshots but, in his testimony, he stated that he heard four gunshots.

[28] As to the identity of the assailants, a perplexing version emerged. Mr Wesley knew both appellants well. He testified that at the time of the shooting he could not identify the assailants because he was in shock but could do so when he testified. He testified that before he made his second statement the appellants' names 'came up' and he could then put 'a face' to the people whom he saw. He conceded in cross-examination that the names of the appellants 'came up' because he had heard their names being mentioned as the people who might be involved in the killing of the deceased. He explained that at first, he was uncertain but he 'became sure' when he heard their names being mentioned as the assailants.

[29] The other reason he mentioned the appellants as the assailants was because he recognised, what he referred to as the second appellant's car. During re-examination he recited the car's registration details and said he remembered them after seeing them for one second at the scene. He did not mention the car's registration number in his first statement. It leaves no doubt that something happened between his first and second statements. It is clear that he and Mrs Shortridge were subjected to undue pressure.

[30] The evidence pertaining to the car passing under e-toll gantries is neutral. It only established that the Golf drove in a northerly direction between 13:11 and 13:16. There is no indication of the distance between the gantries and the crime scene. The two occupants could not be identified.

[31] The high court rejected the first appellant's version as unconvincing, contradictory and improbable. It also found that the second appellant contradicted his (first appellant's) version. The first appellant's version is not beyond criticism. He contradicted himself with regard to the time he left his house at Constantia Kloof and the time he had arrived in and left Ennerdale. The cellular phone records, which he admitted, also painted a different picture with regard to his movements on the morning and afternoon of the incident. He conceded that he could not remember the precise times of his movements and that his testimony with regard thereto was based on his daily routine.

[32] The difficulty is the uncertainty regarding the exact time of the incident. According to Mrs Shortridge's statement the incident happened at approximately 12:30 while Mr Wesley testified that it happened at 11:30. The high court decided that the time stated in Mrs Shortridge's statement was correct, without proffering any reasons for its conclusion or preference. It must be remembered that she testified that although she did not keep track of the time, the incident happened early in the morning.

[33] The second appellant's testimony that he and the first appellant were in Ennerdale, at the latter's business, from approximately 10:00 is incorrect. It was largely based on general routine. His testimony that he remained at the business for the whole day and that the first appellant left at some stage stands unshaken.

[34] Although the criticism levelled against the appellants' versions was justified, the rejection of their versions should not have been harnessed to rescue a weak case. The onus to prove the guilt of the appellants rested upon the State throughout, which it had to discharge beyond a reasonable doubt. In this matter, the totality of the evidence did not establish their guilt beyond reasonable doubt, but a suspicion. They should have been acquitted.

[35] The friends and family of the deceased actively tried to assist in bringing to justice those they thought were responsible for his death. I hope that they will understand that suspicion, even a strong one, does not translate to the required

standard of proof in criminal matters, which, as mentioned already, is proof beyond reasonable doubt.

[36] The appeal must therefore succeed. Accordingly, the following order is made:

1 The appeal is upheld.
2 The order of the high court convicting the appellants, and the resultant sentences, are set aside and replaced with the following:
‘Both accused are acquitted on all three counts.’

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ACTING JUDGE OF APPEAL

APPEARANCES:

For appellants:	PJC Kriel
Instructed by:	David H Botha, du Plessis & Kruger Houghton Estate, Johannesburg Symington & De Kock, Bloemfontein.
For respondent:	J Serepo
Instructed by:	Director of Public Prosecutions, Johannesburg Director of Public Prosecutions, Bloemfontein.