

SOUTH AFRICA / JUDGMENT

S v Ndawonde (CC124/2012D) [2012] ZAKZDHC 89; 2013 (2) SACR 192 (KZD) (11 December 2012) [2012] ZAKZDHC 89

COURT

Kwazulu-Natal High Court, Durban

BEFORE

JV Sanders

CASE / FILE NUMBER

CC124/2012D

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REPORTABLE

IN THE KWAZULU – NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CC124/2012D

THE STATE

versus

BONGINKOSI MZIWEBANDLA

NDAWONDE a 25 year old South African male, of 2630 Mzomusha, White City Inanda

(Hereinafter referred to as the accused)

JUDGMENT

Delivered on 11 December 2012

JV SANDERS, A. J.

- [1] The Accused is charged as per the indictment. The Accused pleaded not guilty to all charges. No statement in terms of section 115 of act 51 of 1977 was made on behalf of the Accused, save to say that the Accused denied all the allegations against him. Before any evidence was led the defence made admissions in terms of section 220 of the Criminal Procedure Act 51 of

1977 relating to the cause of death of the deceased, and the necessary chain evidence in connection therewith. After which the Accused confirmed that the admissions made on his behalf were factually correct.

- [2] The state called two witnesses namely Zandile Ayanda Mdluli (hereafter “Mdluli”) and Constable Mduduzi Mhlanga (hereafter “Mhlanga”). The defence in turn called the Accused himself to the stand who testified on his own behalf. Mdluli is an accomplice to the murder of the deceased. She is also a single witness in respect of all the events she testified about, save the arrest of the Accused. Mdluli was however not warned by the Court in terms of section 204 of the Criminal Procedure Act, as Ms. Vahed who appeared for the state advised the Court that Mdluli had already been indemnified against prosecution in regard to the charges that the Accused faced when she Mdluli testified at an earlier trial before my sister Madam Justice N Govender Acting, in which her mother and her brother were accused of the very charges that the accused faced before us in this trial. The Court agreed with the submission made by Ms. Vahed that under the circumstances any warning that this Court may give to the witness in terms of section 204 of Act 51 of 1977 would be entirely superfluous.
- [3] I have decided to set out the prevailing legal position with regard to how the evidence of a single accomplice witness should be approached and evaluated by this Court before I undertake a summation of the evidence before us.
- [4] Mdluli is a single witness in as far as the bulk of her testimony is concerned. The dangers of relying exclusively on the sincerity and perceptive powers of a single witness has evoked a judicial practice that such evidence should be treated with caution; It would seem that this practice originated from the remarks made by De Villiers JP (as he then was) in *R v Mokoena*¹ where he said following “Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction (by the section), but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus this section should not be evoked where for instance the witness has made a previous inconsistent statement where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation etc.”
- [5] Is the practice advocated by De Villiers JP a rule of law or merely a salutary guide? As the learned authors Zeffertt & Paizes² have pointed out “it is regrettable that courts have occasionally tendered to ‘tick off’ the various factors mentioned by the learned judge, almost as if they were applying a statutory provision. The learned judge clearly did not intend to lay down a mechanical rule, for, as Schreiner JA held in *R v Nhlapo*³, the cautionary rule “may very well be helpful as a guide to the right decision; but it naturally requires judicious application and cannot be expected to provide, as it were automatically, the correct answer to the question whether the evidence of the Crown witness should be accepted as truthful and accurate. These remarks were quoted with approval in *R vs Bellingham*⁴; it is clear that the more flexible approach to single witness testimony represents the better and majority view.

See also *S vs Buda & Others*⁵ wherein Macdonald AJA expressed the view that the cautionary rules are no more than guides, albeit, very valuable guides which assist the Court in deciding whether the Crown has discharged the onus resting upon it. (89F) Moreover he added that ‘the exercise of caution should not be allowed to displace the exercise of common sense; and once a judicial officer has anxiously scrutinized the evidence of a single witness he should not be swayed by fanciful and unrealistic fears; (at 90 E & F); See *R v J6*; *Artman & Another*⁷; and also *S vs Janse Van Rensburg and Another*⁸.”

- [6] The Court now turns as it must to consider the legal position as far as accomplices are concerned. Section 257 of the old Act provided that a court could only convict on the single evidence of an accomplice if the offence had been proved by some other evidence than the evidence of the accomplice. This section no longer applies. However despite the demise of section 257 the cautionary rule relating to the evidence of an accomplice witness survives. Its purpose in the words of Schreiner ACJ, in *R Mpompotsche & Another*⁹, “is to ensure that, even if the section is satisfied there is some further guarantee that the right man has been brought to trial.”

The reasons for approaching the testimony of an accomplice with care were set out by Holmes JA in *S v Hlopezula & Others*¹⁰ as follows: “first he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example a desire to shield a culprit or, particularly where he has not been sentenced the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing deception – his only fiction being the substitution of the Accused for the culprit”.

- [7] Wigmore however, expressed the view that the supposed promise or expectation of conditional clemency is the essential element, and that without it the whole basis of mistrust fails. The learned author added: “We have passed beyond the stage of thought in which the commission of crime, self-confessed, is deemed to render him radically a liar.....The extreme case of the wretch who fabricates merely for the malicious desire to drag others down in his own ruin can be no foundation for a general rule.” See *R v Gumede*¹¹; In *Isaacs & Another vs S12* the court pointed out that since the accomplice had already been convicted and sentenced so that any hope of being either indemnified

or found not guilty had fallen away, his intimate knowledge of the planning and commission of the crime – far from being a basis for not trusting his testimony – ought to be regarded as adding value to it.”

- [8] The Court now turns to applying the law as stated above to the facts of this particular matter. It is common cause that the witness Mdluli had already been indemnified against prosecution in respect of the charges the Accused presently faced in this Court. Better yet, she had already received her indemnity on the day when she caused the Accused herein to be arrested by pointing him out to the police as the person who had killed the deceased, her stepfather. This places Mdluli on a completely different plain from the usual position in which an accomplice who has been warned in terms of 204 of the Criminal

Procedure Act finds himself. In the usual scenario the wretched witness is obliged to tread a very lonely path as he desperately

strives to disgorge enough information about the crime he and his erstwhile partners in crime committed in order to establish their

guilt, while at the same time implicating himself sufficiently in the commission of the crime to establish his bona fides, thereby securing his indemnity from prosecution at their expense. Such a witness faces the ghastly prospect should indemnity not be granted for whatever reason, that prosecution could ensue, and upon conviction the very real possibility of confronting his erstwhile partners in crime in some dimly lit prison corridor or

worse yet, in a crowded prison cell in the dead of night looms large. In the light of the above considerations it is no wonder that such a witness' evidence should be treated with the utmost care. None of these considerations apply to the evidence of Mdluli. After careful consideration of the evidence before us I am satisfied that the only cautionary rule applicable to Mdluli's evidence is the cautionary rule which applies to the evidence of any single witness. That said the Court is not unmindful of the fact that Mdluli is an accomplice witness and that remains a factor which the Court will undoubtedly take into account when the entire mosaic of the evidence before us is considered..

[9] A summation of the evidence of Mdluli is as follows. She informed the Court that she is 29 years of age, and that the deceased was her stepfather. On the evening of the 31st of December 2008, she was at home in the company of her mother, her brother Vusi and the deceased. They had been drinking wine and vodka. As the evening wore on the deceased called her to the back of the house, whereupon he informed her that he was not her biological father and proceeded to make advances to her, at which point he also tried to kiss her. She repelled his advances. She then went and woke her mother who was asleep at the time, and reported to her what had transpired. Suspecting that the deceased would try again, it was agreed between them that her mother would go and hide behind the house which she duly did. Thereafter the

deceased called called her to the back of the house, where he once again made improper advances of a sexual nature to her. The two of them remained there until the early hours of the morning when they were disturbed by a neighbour. As a result she, her mother and her brother Vusi later got together and decided that the deceased should be killed. The reason that they reached this conclusion was not solely to protect her from the deceased's advances, but also due to the fact that he had a lover at work and her mother was afraid that she was going to lose the deceased in any event. During their meeting Vusi was tasked with finding a person or persons to carry out the killing of the deceased.

[10] On Friday the 24th of July 2009 Mdluli received a telephone call from Vusi who advised her to go to a specific bus stop at eleven hundred hours in order to meet the person whom he (Vusi) had sent. According to Vusi that person had agreed to kill the deceased. She duly proceeded to the said bus stop at the appointed time. There she met the person whom she

identified by his clothing as he was dressed just as Vusi had said he would be. He wore cream corduroy trousers, white takkies, a black leather jacket and a striped woolen hat. In appearance he was

short and dark, with a beard and had facial hair on his cheeks and big eyes. He carried a small orange plastic bag, containing what looked like a CD holder. She had never seen the person before. This person approached her and introduced himself by saying that he had been sent by Vusi. She informed the Court that that person was present in Court. Upon being asked to point him out she pointed out the Accused as being the person she was referring to. Between herself, her mother and Vusi, they used the word Polly, as their code word for identifying the hit man whose services they sought to engage. This was not the Accused's real name nor was he even aware of it. Their mother had made up the code word. On the way home the Accused inquired why they wanted the deceased to be killed. When she gave him the reasons, the Accused responded by saying that the deceased deserved to be killed. They walked to her home and upon arrival there she took the Accused into her bed room. She then telephoned her mother who was at her place of employment in Balito; after which she handed the phone to the Accused who then spoke to her mother. Later the Accused went out into the yard in order to see the lay of the land and to determine the spot where he would stand when executing the deceased. There were trees in the yard and amongst them were an orange tree and a plum tree. There was also a kraal which used to be a goat kraal. The Accused then left. On Sunday the 26th of July 2009 she was visiting her neighbour when she received a telephone call from Vusi instructing her, that she was to go to a certain bend in the road where the borehole is at nineteen hundred hours that evening in order to 'meet 'them'. She did what Vusi had instructed her to do, and at the appointed time and place she met the Accused who was in the company of another man whom she did not know. There were street lights at this spot and the lights were shining at the time. The other person was wearing blue jeans and white takkies. They did not linger, and immediately set off for her home. There were no street lights on route to her home. Upon their arrival at her home she took the two men into her bedroom. The only other persons present at the homestead at the time were the deceased and her brother's child. Her mother was aware of what was afoot. At that stage she called her mother. It was dark at the time, and there were no lights on in her bedroom save the light emitted by the television which was on, from it she could see, but not clearly. The two men lay down on her bed, and she lay down on the floor. She did not fall asleep, she was watching television. The men must have slept because she heard snoring. At three hours thirty the next morning both men put on overalls and gloves which they referred to as their 'working clothes'. Before leaving her room they

told her to lock the door after they had left and get into bed. After the two men had left her room she did as she had been instructed. As she lay in bed she heard the deceased going outside to fetch water from the tap in the yard, as he habitually did. She then heard the sound of many gunshots. She got up and exited her room, at which point, she saw her mother. She also saw the deceased lying outside. There was no sign of the Accused or his companion. Later after the police arrived and took photographs she made a statement to them. The statement which she made contained some aspects which were true and some which were false. She essentially denied any

knowledge and / or involvement as far as killing of the deceased was concerned.

[11] The next time she saw the Accused was on the 17th of August 2009 in Stanger. This was a planned meeting at which her mother was also present. The purpose of the meeting was for the Accused to receive his payment for killing the deceased. This meeting took place in broad day light in the middle of the day. She had to be present at the meeting as her mother did not know the Accused. She saw the Accused standing outside Pep stores. She approached him and took the Accused to her mother. The three of them then proceeded to KFC. Inside the KFC her mother handed the Accused money in the sum of twelve thousand rand. Mdluli told the Court that she did not count the money that her mother gave to the accused but that her mother had done so. This amount was not the full amount agreed upon. Her mother informed the Accused that he would receive the balance of three thousand rand the

following week. The Accused was none too pleased about this arrangement but he accepted it. On the 24th of August 2009 Mdluli again met the accused in Stanger. Once again she was in the company of her mother on this occasion they met the Accused near Discom; where after they once again proceeded to KFC where her mother handed the accused the sum of three thousand rand which constituted full and final payment of the agreed price. This meeting, like the last, took place in broad day light. The next time she saw the accused was during September 2009 she was at home one afternoon, when the accused unexpectedly paid them a visit. He told them that he was passing through their area, and had decided to check on them. On that occasion he spent under half an hour with them.

[12] On the 20th of July 2010 she and her mother were both arrested, for the part that they had played in the murder of the deceased. When she was arrested she initially stuck to the original story which she had told the police. Whilst travelling to Durban with the investigating officer she was asked whether she had seen her mother handing over a sum of twelve thousand rand, as payment for the killing of the deceased. She then realized that the police were in possession of a lot of information. She then decided to come clean and tell the police the whole truth. As a consequence of that decision she ended up testifying against her mother and brother at their trial, after which she was indemnified by that Court from prosecution in respect of the charges that the Accused faced in this Court.

[13] On Sunday the 20th of May 2012 she was visiting her aunt who rents a room in the Inanda area. Whilst there she saw the accused walking in the company of other persons; it was overcast at the time but she saw him clearly as he walked towards her. He was engrossed in conversation and did not notice her. She immediately ran to her aunt who was in the house and used her phone to contact the investigating officer. Having made her report, the investigating officer asked her to contact the Inanda police station. In the meantime she had requested her aunt to follow the accused with a view to keeping tabs on him. The end result of her efforts was that she pointed out the accused to the police as he was seated in the stands of the recreation grounds. She further told the police the Accused was wearing a red hooded jacket. She was present when the Accused was arrested; but he did not see her at the

time, nor did she reveal herself to him. The version put to the witness on behalf of the Accused amounted to a bare denial of her version of events, with the exception that he admitted that he was arrested at the Inanda recreation grounds on the 20th of May 2012. The Accused also denied that he ever wore sun glasses this was in response to Mdluli's evidence to the effect that on one of the occasions when she had been in his company he was wearing sun glasses on his head.

[14] The next witness called by the state was Mduduzi Mhlanga (hereafter Mhlanga). He told the Court. He told the court that he was a constable in the SAP and that he was the person who arrested the Accused. At the time of his arrest the accused was sitting in the stands at the recreational centre in Inanda watching a sporting event. The accused was arrested after he had been pointed out to him by Mdluli as the person who killed her stepfather, the deceased. Nothing turns on the cross examination of this witness. In essence it was not disputed that the Accused was indeed arrested at the Inanda recreation centre, whilst he was a spectator seated in the stands watching a sporting event. Neither was it disputed that the reason for the accused's arrest was because he had been pointed out to the police as the person who had killed deceased. The Accused does not dispute the role Mdluli played in his arrest. He confirms her evidence to the effect that he did her at all on the say he was arrested. The Court is of the view that nothing turns on exactly what role was played by each policeman on the day in question it being common cause that Mhlanga was indeed in the company of a colleague when the accused was arrested.

[15] After the state case was closed the Accused was called to the stand to testify on his own behalf. He was the only witness to do so. In essence he denied Mdluli's evidence in its entirety to whatever extent such evidence related and / or referred to him. He told the Court that he had never seen Mdluli in his life under any circumstances. He could give no specific reason why she would falsely implicate him, of all people, in the killing of the deceased. He told the Court that he was self-employed as a freelance photographer. The neither owned a studio nor did he ever operate from one. His modus operandi was to stop potential clients in the street and offer to take their photographs, and if the offer was accepted he would subsequently deliver the photographs personally to a given address. In cross examination he agreed that he heard the evidence of Mdluli to the effect she had seen him wearing the following items during the occasions when she alleged that she had met with him; namely

- 1) a black leather jacket; 2) Powder blue trousers made of linen; 3) Cream corduroy trousers.
- The Accused conceded that he had heard Mdluli mention the said items in her evidence as items of clothing which he had allegedly worn at the times, or at least some of the times,

that he had spent in her company. He conceded that he did in fact own a black leather jacket. Furthermore he also owned cream trousers

which were made of a thickish fabric which was not corduroy but was similar to the fabric which jeans are made from. He also owned powder blue trousers, which were not made of linen but were made of a similar fabric. Upon being asked how Mdluli knew about specific items in his wardrobe given his version that they had never met, his answered that he simply did not know. That concludes the Court's summation of the evidence before us.

[16] In evaluating the evidence the Court accepts it has been admitted that that the deceased died as a result of gunshot wounds as per exhibit "B" being the report on the medico legal postmortem examination of the body of the deceased. This Court also accepts that the various roles played by the witness Mdluli, her mother and her brother Vusi in bringing about the deceased death are not in dispute. That being so it is our considered view that the only issue on which this matter turns is whether this Court can find beyond a reasonable doubt that Mdluli was not only truthful in identification of the Accused as the person who was hired to kill the deceased, but also that in all the surrounding circumstances of this case her identification of the Accused may be relied upon beyond any reasonable doubt. Section 208 of Criminal Procedure Act 51 of 1977, provides that the Court may convict on the evidence of any single witness provided that the Court is satisfied that the evidence of that single witness is satisfactory in every material respect.

[17] We find that Mdluli is an exceptionally good witness in terms of her attention to detail and her ability to recall and relate events in the chronological order of their occurrence. According to Mdluli she had occasion to observe the Accused in various different situations and locations both at night but mostly by day. The Court is satisfied that in considering the entire mosaic of her evidence that there is no doubt that she had sufficient opportunity for proper observation and that the circumstances were such that the Court can safely rely beyond a reasonable doubt upon her identification. The Court may safely discard any possibility of Mdluli telling lies in order to falsely implicate the Accused. Had any bad blood existed between them this Court has absolutely no doubt that the Accused would have brought it to the Court attention, as constituting a motive for her singling him out as the culprit.

[18] When turning to the Accused evidence, his defence amounts to a bare denial. However when one considers his evidence carefully it is telling that there is both circumstantial and direct evidence in the Accused's version of events which corroborate Mdluli's version of events. It should be remembered that what the Accused is in essence telling this Court is that Mdluli has made a terrible mistake, in that she has identified a totally innocent man as the man they had hired to kill the deceased. The Accused would like the Court to accept that the forces of coincidence and misfortune have combined so as to ensure that his physical features when taken together collectively give him an appearance which is close enough to the description of the real killer so as to cause Mdluli to mistakenly identify him as that person. But it gets worse for the Accused, the Accused would like that Court to accept that having mistakenly chosen him out of all the people she could have picked by sheer good fortune for Mdluli he just happens to have to sort of life style that one might reasonably

expect him to have if her version were true. But what really proves beyond any doubt (let alone reasonable doubt) that Mdluli is telling the truth is the fact that Mdluli is able to identify various items of clothing which she says the Accused was wearing on the occasions when they met. The Accused concedes that he indeed owns such clothing; and is unable to offer any explanation on his version of events as to how Mdluli would have any idea what items of clothing were to be found in his wardrobe. It is the considered view of this Court that the knowledge of the Accused clothing takes us beyond the realm of coincidence and misfortune. The Court finds that the quality of Mdluli as a witness coupled with the corroboration of her evidence regarding the clothing which the Accused admits ownership of, is sufficient to prove beyond a reasonable doubt that Mdluli's evidence is the truth. In the premise the Accused is convicted on count 1 as charged.

DATED AT DURBAN THIS 11th DAY OF DECEMBER 2012.

J. V. SANDERS A.J.

1 1932 OPD 79 at 80;

2The South African Law of Evidence 2nd Ed (2009) at page 863;

31953

(1) PH H11 (A);

4 1955

(2) SA 566 (A) at 569 paragraphs G – H

5 2004

(1) SACR 9 (T) at 14 – 15;

61966

(1) SA 88 (SRA;

7 1968

(3) SA 339 (A) at 341 (C)

82009

(2) SACR at 216 (C) at 9

9 1958

(4) SA 471 (A) at 476 E;

10 1965

(4) SA 439 (A) at 440 D – E;

11 1949

(3) SA 749 (A) at 756

12 [2006] 2 All SA 163 (C)

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Prepared on 10 October 2026 · Esheria