IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL : PIETERMARITZBURG

APPEAL CASE NO.: AR 497/08
DCLD CASE NO.: CC259/06

In the matter between :

FREDA THEMBI MTHEMBU **APPELLANT**
(Accused in the Court *a quo*)

and

THE STATE **RESPONDENT**
(State in the Court *a quo*)

J U D G M E N T
DELIVERED ON : 22 MAY 2009

PATEL J :

[1] The appellant in this matter, Mrs Freda Mthembu, with leave of the Court *a quo* appeals against her conviction on one count of murder for which she was sentenced to 20 years imprisonment. I might in passing mention that the appellant was charged with a co-accused, Mr Linda Masuku ("Masuku") on the same count. At the close of

the State's case he was discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977 ("the Act").

[2] By way of introduction, I set out the background facts. The conviction of the appellant arose from the killing of one Vusi Mathonsi ("Mathonsi") on 20 June 2005. He was, in his lifetime, the brother of the appellant and resided with the appellant. The State relied primarily on the evidence of Mr Thamsanqa Emmanuel Mthiyane who was also known as Kati (hereinafter referred to as "Kati"). It is not in dispute that it was Kati who shot and killed the deceased on 20 June 2005. He pleaded guilty to the murder of Mathonsi and was sentenced to 18 years imprisonment. It is not in dispute that Kati knew the appellant well. He had grown up in the area of appellant's homestead, in KwaMashu, Durban and was on friendly terms with her save that the extent of this friendship was in dispute. The appellant is a teacher by profession but also engaged in business operations including the running of a tuck-shop. Kati was a member of the SANDF and stationed at Ladysmith.

[3] It was Kati's evidence that he had been hired by the appellant to kill her brother because her brother had become troublesome. He had been approached by the appellant "to remove" the deceased

which Kati understood to mean that he should kill the deceased. They had exchanged telephone numbers and he remembered the accused's cellular number to be 083 436 4941. I mention this because circumstantial evidence was led by the State to bolster the evidence of Kati who was not only a single witness but an accomplice. According to Kati's evidence the appellant not only wanted to have the deceased killed because he was troublesome, but that she would also receive monies from insurance policies from which she would pay Kati an amount of approximately R15 000 to kill the deceased. On Saturday, 18 June 2005, according to Kati's testimony he telephoned the appellant and informed her that he was in need of money and was prepared to kill the deceased and to that end did not repair to his own home but instead sought refuge in the home of Masuku. On Sunday, 19 June 2005, he and Masuku went in search of the deceased but could not find him.

[4] On 20 June 2005, and in the evening, Kati contacted the appellant to ascertain the whereabouts of the deceased and was told by her that he was at the Mathonsi homestead and she will ensure that he is sent out on an errand despite the lateness of the hour and that he should execute the evil deed whilst he was en-route doing the errand. Under no circumstances was he to kill the deceased in the

Mathonsi homestead. Kati accordingly followed the deceased and, at an opportune moment, shot and killed him.

[5] On 21 June 2005, he called the appellant telephonically and she appeared to be mournful and seemed to be distressed. This, according to Kati, was a behaviour demanded by the occasion rather than any genuine remorse. After the passage of a few days Kati telephoned the accused and asked for payment since he had completed his part of the bargain. He was told to wait until the funeral was over. A few days after the funeral Kati once again telephoned the accused and pressed for payment.

[6] On 28 June 2005, Kati received a message from the appellant on his girlfriend's cellular phone informing him that a sum of R7 530 had been deposited into his bank account and he then immediately withdrew a sum of R7 400. This is corroborated by Exhibit B, the bank statement of Kati. Kati withstood vigorous cross-examination and explained the contradiction between the statement filed in terms of Section 112 of the Act at his trial wherein he stated that Masuku was present when he shot the deceased. His explanation was that a mistake had perhaps crept through the process of interpretation. He was adamant that Masuku was not present when

he killed the deceased. He denied he had any relationship with Nkosingiphile Nyandeni ("Nyandeni") or that he had conspired with the appellant's sister Bongiwe to falsely implicate her. Nyandeni, when she testified, corroborated him on this essential aspect.

[7] Nyandeni testified that on 20 June 2005 she was at the tuckshop at the Mathonsi homestead. She was telephoned by the appellant to enquire about any stock requirements and at the same time she enquired about the whereabouts of the deceased. She informed him that he was out. Later that evening and at about 18h20 the deceased came to the tuckshop and informed her that he was telephonically requested by the appellant to go to Ntshingila's homestead to get the telephone number of a nearby school from Lindiwe Thokozile Ntshingila ('Ntshingila') who was also a school teacher. This evidence, albeit hearsay, was crucial to the State's case. The appellant's Counsel argued in the Court below, as they did before us that this was hearsay and therefore inadmissible.

[8] Ntshingila testified that the deceased had come to her house on the evening of 20 June 2005, requesting the telephone number of the school where she taught. Ntshingila's further evidence was to the

effect that it was open to the appellant to have telephoned her at home since the appellant had both her telephone numbers. Her landline was working on the night of 20 June 2005. In fact, the appellant's husband had asked her to summon the police on the landline, which she did. She denied the appellant's version that the landline was either out of order or engaged. Under cross-examination it was put to her that the appellant did not know the number of her cellphone. This she denied emphatically. However, when this witness was recalled, the appellant through her Counsel did a *volte face* and not only did she admit that she had her cellular number but had made two calls to Ntshingila on her cellular phone.

[9] This turnabout was no doubt occasioned by the evidence given by Hilda du Plessis, a forensic data analyst employed by MTN Cellular Network. She testified on Exhibit E which showed the telephone calls made to and from accused's cellular phone, the duration thereof, and the caller identity number. Her evidence provided corroborative circumstantial evidence to which I shall allude a little later.

[10] The State also tendered evidence of Mr Sibongisile Shabalala, a teller at the First National Bank at Ladysmith, to confirm the correctness of the entries made on Exhibit B, Kati's bank statement. He further testified that when a deposit is made they did not verify the identity or the name of the depositor. It was common cause that the name of the depositor on the slip was someone other than the appellant. For obvious reasons it would have been foolish of the appellant to put her name on the deposit slip.

[11] The appellant in her defence denied all the allegations against her. She attributed her implication in the murder to an alleged feud between herself and her sister, Bongiwe, over the ownership of the Mathonsi homestead. It was not only Kati who was drawn into this conspiracy to falsely implicate her but all the State witnesses who had testified, in particular Nyandeni. The appellant insisted that she had received a phone call from Kati but this was merely for her to act as intermediary to resolve a lover's quarrel between Kati and Nyandeni. To that end the appellant in her evidence in-chief admitted to receiving just one call but was constrained in cross-examination to concede that she had received three calls from Kati during the relevant period.

[12] Under cross-examination, she further admitted that not only had she known Kati well but that she had more contact with Kati than that contended for in her evidence in-chief. She also recanted on her earlier denial of a customary ceremony being held at her homestead in May 2005, a fact which was corroborated by both Nyandeni and Ntshingila, and both she and her witness said that this had happened in February 2005 and not in May. Apropos, the proceeds of the insurance policy, the appellant initially testified that there were only two policies on the life of the deceased amounting to no more than R25 000. Under cross-examination she admitted that she would receive the sum of R45 000 from the insurance policies, despite deposing to an affidavit in her bail hearing wherein she admitted to receiving R50 000 from the various policies on the life of the deceased.

[13] I do not propose going through the other contradictions in her evidence save to emphasise that according to her testimony she was nowhere near the Prospecton branch of First National Bank on 28 June 2005 when a deposit was made into the account of Kati. When confronted with the fact that her cellphone recorded a call being received on her cellphone in the Prospecton area on the 28 June 2005, she sought refuge in the fact that one of the young

persons in her family, namely Sizwe, was using her car at the relevant time and maybe her cellphone had been left in her car.

[14] However, when Sizwe testified, he was unable to confirm that he had the appellant's motor vehicle on the 28 June 2005. He did not see any cellphone in the car and if indeed the cellphone had rung, he would not have engaged in a lengthy conversation as is recorded in Exhibit E. He could also not recall receiving a telephone call from the Kwa Mashu Police Station. The probabilities are overwhelming that the appellant herself received this call on the 28 June 2005 since it is common cause that she attended the Kwa Mashu police station on the 29 June 2005 to make a statement. Exhibit E provides evidence of both these calls being received on the appellant's cellphone.

[15] It is a trite proposition of our law that the credibility findings and findings of fact of the Trial Court cannot be disturbed unless the record shows them to be clearly wrong. Counsel for the respondent urged us to follow the approach commended in **Moshephi & Others v R (1980 – 1984) LAC at 59 F-H** which was approved in **S v Hadebe & Others 1998 (1) SACR 422 (SCA)**, namely :

"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

[16] Corroboration in some material respect is an important safeguard in evaluating and accepting the evidence of an accomplice witness

especially if he is a single witness. Such corroboration does not have to be direct evidence. Circumstantial evidence connecting the appellant with the crime is sufficient. The fact that the appellant was shown to be a lying witness, is also a safeguard which reduces the risk of a wrong conviction.

[17] In my view the court *a quo* correctly relied on the evidence of Kati and exercised the necessary caution in evaluating his evidence. Kati had already pleaded guilty to the murder and was sentenced to 18 years imprisonment some 18 months before the appellant's trial commenced. He had nothing to gain by testifying against the appellant. Be that as it may, the important aspects of Kati's evidence were corroborated by Nyandeni and Ntshingila. Kati had testified that he would at times contact the appellant from a pay phone at her tuckshop and, on the instruction of the appellant, would not pay for such calls. Nyandeni confirmed this as well as the fact that appellant was aware of this. She said further that Kati would telephone the appellant to let her know that he was at the tuckshop and the appellant would call him back.

[18] Nyandeni's evidence was that on the day the deceased was killed, the appellant had phoned her in the afternoon to enquire if the

deceased was at home. Nyandeni confirmed that he was and the appellant said she would telephone him at the house. Some time later that evening, the appellant requested Nyandeni to unlock the gate and let him out so that he could go to the Ntshingila's house to get a telephone number for the appellant. That was the last she saw of him. This aspect of Nyandeni's evidence corroborates Kati's evidence that the appellant had undertaken to get the deceased out of the house so that Kati could kill him. The appellant herself confirmed that she telephoned the deceased and requested him to go to Ntshingila's house to obtain the telephone number, but that she had asked him to go the following day. This was gainsaid by Nyandeni's evidence, albeit it hearsay. According to Nyandeni, the deceased had informed her that he was asked by the appellant to go to Ntshingila's homestead that very night, 20 June 2005. In my view, the court *a quo* correctly admitted this evidence. It is unfortunate that the court *a quo* made reference to one of the old exclusions to the common law rule against hearsay, namely, a dying declaration. In any event it appears from the record that the learned Judge considered the provisions of the statutory hearsay rule and made his finding in accordance with the rule. Not only could this evidence be admitted but, contrary to what the learned Judge said, despite its prejudice to the appellant it could be relied

upon together with the other inherent improbabilities in rejecting the version proferred by the appellant, since its admission is in the interest of justice and far outweighs the prejudice to the appellant.

[19] Kati's evidence is corroborated by independent evidence, namely, bank records regarding the deposit of R7 530 into his bank account, as well as the withdrawal of R7 400. This deposit was made at the Prospecton branch of First National Bank on 28 June 2005. The appellant's cellphone records indicate that at 10:40am on the 28th June 2005 the appellant's cellphone was drawing a signal at Prospecton. Whether one regards this as a "happenstance", as Counsel for the appellant will have us believe, or a circumstance, it certainly is material circumstantial evidence which called for an answer. No plausible explanation was forthcoming from the appellant.

[20] From Sizwe's evidence taken together with the explanation proferred by the appellant, the court *a quo* was correct in rejecting her version as to both her whereabouts and that of the phone on the 28 June 2005, especially since Sizwe could not come to her rescue. The only inference that one can reasonably draw is that the

appellant was trying to distance herself from being anywhere near Prospecton when the deposit was made.

[21] Her lack of candour apropos not having Ntshingila's cellphone number and later recanting that she had not saved it on her phone, is again indicative of a desire on the part of the appellant to fortify the reason for sending the deceased on an errand when the same was not necessary. The only logical inference one can draw is an inference which is consistent with the evidence of Kati, namely, that the appellant was putting the deceased in a situation in which he could be killed by Kati. I am therefore in agreement with the submission made by Counsel for the respondent that Ntshingila's cellphone number was significant as the appellant would have no plausible reason to send the deceased to her homestead, as she could have called Ntshingila on her cellphone to get the telephone number of the school, if, as the appellant would have the court believe, at the material time Ntshingila's landline was not working.

[22] It is equally illogical that the appellant would have gone to all the lengths she did to determine the whereabouts of the deceased on the 20th June 2005 if she only wanted him to obtain the telephone number from Ntshingila the following morning, that is to say on

the 21 June 2005. The only logical explanation is that provided by Kati.

[23] Perhaps the court *a quo* erred in stating that "we did not find any aspect of Kati's evidence unsatisfactory". As alluded to earlier, there was certainly a contradiction between Kati's evidence in the court *a quo* and his Section 112 statement regarding the presence of the appellant's co-accused when Kati shot the deceased. When cross-examined about this discrepancy he was emphatic that he was alone. He further explained that the interpreter who helped his Counsel when the Section 112 statement was canvassed must have made a mistake. However, Kati's statement made to the police, which was handed in as Exhibit D in the court *a quo* clearly shows that Kati was alone when he shot the deceased. However, this discrepancy must be considered in the totality of the evidence of Kati. It is trite that if a witness was untruthful in respect of one aspect of his evidence, it does not render his entire evidence unsatisfactory. A court is entitled to accept those parts of Kati's evidence which is corroborated by other witnesses or some other circumstantial evidence. Hence the court below, in my view, did not err despite this shortcoming in coming to the conclusion that Kati's evidence was reliable.

[24] Similar criticism can be levelled at the court's finding that Exhibit E, as authenticated by Du Plessis, confirms the telephone calls to and from Kati to the accused and vice versa, and corroborates Kati's version as to the appellant's instructions to the deceased on 20 June 2005. Kati testified that he called the appellant on 21 June 2005 on her cellphone from a landline number in Ladysmith. If one looks at Exhibit E there is no reflection that the appellant received any call from a landline number in Ladysmith since it is not in dispute that the Ladysmith dialling code is 036. However, when appellant testified it became common cause that Kati did call the appellant on 21 June 2005. Further, Kati testified that the SMS on 28 June 2005 was sent to his Indian girlfriend's cellphone and the said SMS was in isiZulu. In any event, according to Kati's evidence as corroborated by Nyandeni, the communication between Kati and appellant was not confined to cellphones only.

[25] I am satisfied that the court *a quo* properly cautioned itself that Kati was a single accomplice witness. However, Kati's evidence was carefully scrutinized and materially corroborated by circumstantial evidence and the evidence of the witnesses set out above. Once the court applied the cautionary rule it is of no great

moment that the court may have omitted to say in its judgment that Kati was also a single witness in respect of the killing. It is a well established proposition of our law that if a court applies the cautionary rule, the test remains the same irrespective of whether there is more than one reason to apply the cautionary rule.

[26] The appeal against conviction is accordingly dismissed.

_____
PATEL J

I agree

_____
STEYN J

I agree

_____
NAIDOO AJ

DATE OF HEARING : **FRIDAY, 17 APRIL 2009**

DATE OF JUDGMENT : **FRIDAY, 22 MAY 2009**

COUNSEL FOR APPELLANT: **ADV. K J KEMP S.C.**

INSTRUCTED BY : **HULLEY & ASSOCIATES**
APPELLANT'S ATTORNEYS
SUITE 17, CORPORATE PARK
11 SINEMBE CRESCENT
LA LUCIA RIDGE
DURBAN
(REF.: Collins/sh/M494)
(TEL: 031 – 5847594)

COUNSEL FOR RESPONDENT: **ADV. B F MANYATHI**

INSTRUCTED BY : **DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS**
RESPONDENT'S ATTORNEYS
12TH FLOOR
SOUTHERN LIFE BUILDING
88 FIELD STREET
DURBAN
(REF.: Mr Manyathi)
(TEL; 031 – 3345114)