IN THE HIGH COURT OF AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Henney J et Pangarker, AJ)

[Reportable]
Case No: A47/2021

In the matter between:

KHANYISO SIGCAWU Appellant

and

THE STATE Respondent

Date of hearing: 16 April 2021 and 17 June 2021

Date of Judgment: 28 July 2021 (to be delivered via email to the parties' legal representatives)

JUDGMENT

Henney, J et Pangarker, AJ

Introduction

[1] The appellant was charged in the regional court sitting at Caledon with one count of murder, that was committed on 15 September 2012 at or near Villiersdorp in the district of Caledon. He unlawfully and intentionally killed the deceased by shooting him with a firearm. He was legally represented during the proceedings and on 29 March 2019, and convicted by the regional magistrate on the above-mentioned charge.

[2] He was sentenced to a period of 15 years imprisonment of which two years imprisonment was suspended for a period of five years on condition that the appellant is not convicted of murder or a competent verdict thereto, committed during the period of suspension. An application for leave to appeal the conviction and sentence was dismissed by the regional magistrate, and on petition to this court, leave was granted in respect of conviction only.

Grounds of appeal

[3] The appellant's grounds of appeal against his conviction was that the court erred in finding that the state has proven its case beyond reasonable doubt, and in particular that the court erred in relying on the evidence of a dying declaration of the deceased. That the court erred in finding that there was no material discrepancies or improbabilities in the evidence of the state witnesses more particularly that of the evidence of Qaqamba Vali ("Nana"), with respect to the last time she had seen the appellant prior to the murder. That the court erred in finding that this witness was an honest, reliable and credible witness. That the court erred in finding that Nana's evidence supports the evidence of the dying declaration. Lastly, that the court erred in finding that the version of the appellant was improbable and by rejecting the version of the appellant.

[4] After hearing the appeal on 16 April 2021, we directed the registrar to bring the following notice to the attention of the parties:

"On a perusal of the proceedings and the consideration of the arguments presented by the parties during the hearing of the appeal, the Judges wish to invite the comment of the counsel for the appellant as well as the state on the following issues:

1) Whether the Magistrate was correct to admit the hearsay evidence without properly dealing with it on the basis of the provisions of section 3 (1)(a) and or 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. See in this regard, *S v Ndlovu 2002* (2) SACR 325 SCA at 341b – 342 (e) para [17] and in particular, *S v Ramavhale 1996* (1) SACR 639 (A) although this case dealt with the admission of hearsay evidence in terms of section 3(1)(c).
2) The state's counsel submitted that on the basis of the decision of *S v Aspeling 1998(1) SACR* it was held that such evidence could be admitted in terms of section 3(1)(a) in circumstances where the defence counsel admitted to the submission of such evidence. The question to consider is whether such admission or acquiescence were reasonable under the circumstances where this was the only evidence upon which the court convicted the appellant.
   See in this regard *S v Halgryn 2002* (2) SACR 211; *Saloman & Another v S 2014* (1) SACR 93 (WCC) where given the circumstances of this case, whether the attorneys failure to object to this evidence during the trial, was reasonable given the incriminating nature of the hearsay evidence (See *S v Ramavhale*).

3) Given the circumstances under which the evidence was admitted, can it be said that the appellant had a fair trial.

The parties are required to indicate to the Judges whether they wish to present further argument during a hearing of the matter (either in open court or virtually) or whether they merely wish to present a further post hearing note regarding these issues.

The parties are requested to file their further heads on or before **14 June 2021** and similarly, indicate whether they wish to have a further hearing on the matter as prescribed to above."

[5] The parties in the light of this notice filed further heads of argument dealing specifically with these issues and a further hearing of the appeal dealing with the issues raised in the notice to the parties dated 7 June 2021, was held on 17 of June 2021. I will deal with these issues raised by the court later on this judgment.

The evidence and common cause facts

[6] It is common cause that the deceased was shot and killed on the evening of 15 September 2012, and that there was no evidence of any eyewitnesses who observed the killing of the deceased. After the shooting of the deceased, who was also known as Mambush, the first witness that arrived on the scene was Charlene Fortuin ("Fortuin"), who stayed opposite the deceased. It was about 11 PM on a Saturday night, when she heard five shots going off, whereafter the deceased called out her name. She went outside, where she found the deceased on the pavement and she observed that he was shot. She asked him what happened and she told him " … *Dat Kaizer wat by the municipality werk het hom geskiet"*[1].

[7] Fortuin further testified that she did not know who the deceased was talking about, but she knew the Nana that he was referring to when he said it is "… *Kaizer van Nana*".[2] The deceased was a taxi driver and he requested her to call the other taxi owners to tell them what happened to him. At that stage, a police van came driving down the road, she stopped them and then she spoke to a police man known as Booysen.

[8] She also observed that the deceased was shot in his stomach. When the deceased told her that he was shot by Kaizer who works for the municipality, she did not know who that person was. She also did not see anybody at the time when she

[1] loosely translated "That Kaizer that works for municipality shot him."
[2] loosely translated "Kaizer of Nana"

went outside after the shooting. The next witness that testified was Booysen, a police sergeant who was stationed at the uniform branch in Villiersdorp. He testified that some stage he also worked at the municipality in Villiersdorp and the municipal workers were known to him. He knew the appellant and he lives in the same area as the appellant. He is known to him as Kaizer.

[9] He confirms the evidence of Fortuin that on the evening of the shooting on 15 September 2012 between 10pm and 11pm, he was on duty and that he went to a scene where a shooting had taken place. The person that had been shot was known to him as Mambush who was a taxi driver and he was still alive at that stage. He enquired from him what had happened and he stated that he had been shot by Kaizer, the man that worked at the municipality and the deceased told him that he should know him.

[10] According to this witness, he initially did not know who it was that the deceased was referring to, and the deceased told told him "… *Kaizer is werksaam by die munisipaliteit, jy behoort hom te ken"*[3]*.* The witness says that after this explanation it was not still clear to him who this Kaizer was, until the deceased further explained that he (Kaizer), was involved in a relationship with Nana. It was only thereafter that he realised who this Kaizer was that the deceased was referring to. In court, he pointed out the appellant, as the person that they were referring to. After having received the information from the deceased he and Adams immediately went to the appellant's

[3] loosely translated "… Kaizer is employed by the municipality you should know him."

house, but they could not find him there. Thereafter they went to Nana's home and they also could not find him there.

[11] On the same day, of which was on 14 January 2019, the investigating officer, Warrant Officer Adams ("Adams") also testified. He also arrived at the scene, where he found Booysen, who at that stage, was still speaking to the deceased. He also spoke to the deceased because he knew him. The deceased also told him that it was Kaizer that works for the municipality, Nana's boyfriend, that shot him.

[12] Adams testified that he knew who Kaizer was and knew that he used to work for the municipality. He further stated that he interacted with him on a previous occasion. He also knew who this Nana was that the people were referring to. He and Booysen, after the deceased were taken away from the scene by the ambulance, immediately went to the place of the appellant. When he arrived at the appellant's place, the door was open and he noticed that the bed was unmade. Thereafter they went to the place of Nana, where he was told that she had seen the appellant about a week ago.

[13] The appellant was only arrested in December 2017. After he spoke to Nana in 2012, he did not immediately take a statement from her. The matter was postponed to 15 January 2019 for Adams to trace further witnesses, including Nana and take statements from them. At that stage, the statement of Nana was not yet taken. The matter was postponed to 26 February 2019 and thereafter once again to 11 March 2019, where Adams was recalled as a witness.

[14] It emerged that he had only taken a statement of Nana after he had given evidence on 14 January 2019. During further cross examination, he was confronted with the statement of Nana insofar as it contradicted his version. From this, it emerged that he was never at the house in the early hours of the Sunday after the incident, but only Booysen, and that he had only seen her a day or two after the incident. It furthermore emerged that Nana had told him in her statement, after he had testified, that it is not correct that she had seen the appellant about a week before the incident, but on the day before the incident, when she indeed spoke to him. Adams corrected himself and did not dispute the version of Nana where it contradicted his version. He testified that the incident happened a long time ago and that he could not remember all the details.

[15] Qaqanba Vali, also known as Nana confirmed that the appellant was her boyfriend and that he is known as Kaizer. The deceased was known to her only as a taxi driver. She was aware of the fact that he was shot and killed on 15 December 2012. At that stage, she was no longer in the relationship with the appellant. After the relationship ended they still got on very well; they greeted each other when they saw each other and they still maintained a good relationship and were friends.

[16] She confirmed the evidence of the police that in the early hours of the Sunday morning after the incident, they came to her place to enquire about the whereabouts of the appellant. The police still believed that they were in a relationship, but she told them that they were not and they requested her to give them his telephone number

which she did not have at that stage. She however told the police that there are still some documents of the appellant and his telephone number might be between those documents.

[17] After searching through the documents, she found his telephone number which she gave to the police. She testified that she last saw the appellant on the day before the incident. They only greeted each other and he told her that he is going to friend of his. That was the last time that she had seen him before he made telephone contact with her on the Sunday. This was after the police had been to her place to look for the appellant. He called and said that the police might come to look for him at her place, and he said if the police would ask her about the incident, she must tell them that she does not know anything about it, which she in any event did not know about.

[18] She asked him what he did and he said he will explain to her a later stage. About a month after that, he called her again and asked her to buy him some airtime for his cellular phone. She once again asked him what he did wrong, and he told her that he will explain it her to at a later stage. She saw him again for the first time when she testified in court. According to her, the reason why the police came to look for him at her place was because they knew that she was involved in a relationship with the appellant for a very long time. They must have thought that she would be the first person that would be able to tell them where to find him. She did not know if the appellant was acquainted with Mambush.

[19] She furthermore confirmed that the appellant worked for the Theewaterskloof municipality at some time. She further testified that the relationship came to an end when she became pregnant after she was involved in a relationship with another man, while he was incarcerated. She denied that she had last seen the appellant in June 2012, and that he had been in the Eastern Cape since August 2012. She also denied that she ever spoke to Booysen or Adams during the early hours of the Sunday morning after the incident, but spoke to a Mr. Nthandiso, also a police officer.

[20] The appellant testified and confirmed that he is known as Kaizer and further confirmed that Nana was his girlfriend with whom he had been in relationship for a very long time. He also confirmed that he worked for the Theewaterskloof municipality from April 2007 until June 2011. He knew the deceased as Mambush who was a taxi driver. He left Villiersdorp in August 2012 because his elderly mother was ill.

[21] At that stage, he was unemployed and his mother passed away in 2018. He was therefore in the Eastern Cape on 15 September 2012 and thereafter found work in Port Elizabeth in March 2014 as a contract worker. He was eventually arrested on 26 December 2017 in the Eastern Cape. He furthermore testified that he had gone to hospital to visit Nana during June 2012 to see the child and he never saw her again. When he left his home in Villiersdorp, he made no arrangements and he merely locked his place and left his property. He denied that he was involved in the killing of the deceased.

Evaluation

[22] Mr Sebueng in his heads of argument submitted that the court a quo was wrong to rely on the evidence of Nana, in the light of the contradictions in the evidence between her and the two police officers Adams and Booysen and the evidence regarding the time when she spoke to the appellant. I do not agree with Mr. Sebueng's submission that this witness was not credible and reliable. On the contrary, she impressed the court as an honest witness, she had a better recollection of the events than Adams, who only took a statement from her about seven years after the incident, and after he had testified in court for the first time on 14 January 2019.

[23] Adams, at a later stage when confronted with the discrepancies between her evidence, conceded that her evidence was correct. She was adamant during cross-examination that the appellant indeed had called her the next day after the police had paid her a visit in order to inquire about the appellant's whereabouts. Her evidence, although she states that she did not speak to Booysen, is consistent with the evidence of Booysen, who said that she was known to him. Her evidence is also consistent with the undisputed evidence that it was known that she was associated with the appellant, which is not in dispute because the appellant it seems was involved in a relationship with this witness. It would only have been the most logical and rational thing for the police in the light of what the deceased had told them, to go to the place of this witness to look for the appellant, based on the deceased's spontaneous and unsolicited utterances made to them. Her evidence is therefore consistent with the surrounding circumstantial evidence and the court a quo was correct to find that this was a credible witness.

[24] Regarding the question whether the court was correct to accept the evidence of the deceased's so-called dying declaration, which points to the fact that the appellant was responsible for the shooting and subsequent killing, this evidence is clearly hearsay evidence. The admissibility of this evidence was not called into question and the regional magistrate did not, it seems, deal with the question of admissibility of this hearsay evidence on the basis of the provisions of the Law of Evidence Amendment Act 45 of 1988 ("the LEAA").

[25] Mr. Lewis who appeared for the respondent submitted that in the absence of any challenge to the admissibility of this evidence in the court a quo, the only question that this court on appeal has to consider is whether the court a quo based on this evidence, was correct to convict the accused of the murder of the deceased beyond reasonable doubt. He submitted that this evidence, even though it was not emphatically dealt with by the regional magistrate in terms of the provisions of the LEAA, seems to have been admitted in terms of the provisions of section 3(1)(a) of the LEAA.

[26] In her judgment on conviction[4], the regional magistrate recognised that the State relies on the dying declaration made by the deceased that the appellant was the person who had shot him with a firearm. The evidence indicates that the declaration was made to 3 witnesses, the neighbour Fortuin and the police officers Booysen and Adams. She found that the dying declaration amounts to hearsay evidence and that

[4] Pg 150 record.

caution should apply when admitting this evidence as it is improbable that a person who is about to die would make a false statement.

[27] It is required of the person to whom such a statement is made, that he/she is a competent witness, is aware that the person is about to die, and that the statement must be made by the victim. Not only was the statement made to Booysen, Adams, but also Fortuin who reached the deceased very soon after he was shot. The regional magistrate goes on to find that the evidence of the witness Nana supports the version of the deceased and she consequently convicts the appellant as charged.

[28] It is apparent from the judgment that the regional magistrate as said earlier, did not deal with section 3 of the LEAA, but rather applied the common law rule relating to hearsay. The issue of hearsay in civil and criminal trials is governed by section 3 (1) of the Act. In our view, the regional magistrate was required to deal with the dying declaration and the admissibility thereof as hearsay evidence, in terms of section 3(1) and not the common law.

[29] The introduction by the prosecutor of the deceased's dying declaration was met with no objection thereto by the appellant and his attorney. The submission by respondent's counsel is that as there was no objection by the defence, section 3(1)(a) applies in that the appellant and his attorney consented to the admissibility of the hearsay evidence against the appellant.

[30] In S v Aspeling[5], the court considered section 3 (1)(a) in circumstances where the defence attorney accepted information which was communicated by the prosecutor from the Bar in relation to the opinion of the pathologist who had conducted a post-mortem examination which was already before the court.

[31] The court found that the attorney's acquiescence to the admission of the evidence implied an agreement to the admission, and thus the admission of the evidence was not irregular. In our view, in the absence of an objection to the introduction of the evidence, the admission thereof as against the appellant, was consented to in terms of section 3 (1)(a) of the Act. The admission of the evidence in terms of section 3(1)(a) should be distinguished from the probative value of the evidence. Once hearsay evidence is admitted, it becomes part of the totality of the evidence which must be evaluated (Mnyama v Gxalaba)[6]. Despite her failure to consider section 3(1), the regional magistrate nonetheless in her judgement approached the hearsay evidence with caution. She considered the admissibility of the evidence and found the deceased's declaration to be supported by the evidence presented by the witness Nana, and the independent witnesses to whom the deceased made the declaration of the identity of his assailant. She thus made a proper assessment regarding the weight or probative value of the evidence.

[32] In our view, as there was no objection to the admission of the dying declaration, the silence of the appellant and the attorney amounted to an agreement to the admission thereof in the trial. The dying declaration and identification of the appellant

[5] 1998 (1) SACR 561 at 567 I-J and 568 A-B.
[6] 1990 1 SA 650 (C).

as the shooter was supplemented and supported by the version presented by Nana and the evidence considered holistically.

[33] If the admission of the hearsay has not been consented to or, where the court in our view has inadvertently admitted the hearsay evidence, such as in this case by not applying the provisions of section 3, then the court still has a discretion to allow the hearsay evidence in terms of section 3 (1)(c), which must be governed by the interests of justice. In circumstances where it would be absurd and not in the interest of justice to have regard to such evidence. In this regard, the court is alive to what was said in R v Hepworth[7], the following was said:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge or an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

Section 3 (1) (c) of the Act which states that:

Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

[7] 1928 AD 265

(ii) the nature of 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 would in the opinion of the court should be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

[34] In consideration of section 3(1)(c), the overarching principle in the admission of hearsay evidence should be the interests of justice (see Parkins v S[8]). In S v Ndlovu[9], Cameron JA observed that in the absence of an agreement, section 3 prohibits the admission of hearsay evidence unless the interest of justice requires it[10]. That the act was designed to create a general framework to regulate the admission of hearsay evidence that would supersede excessive rigidity and inflexibility - and the occasional absurdity of the common law position. The LEAA retained the common law cautions about receiving hearsay evidence, but attained the rules governing when it is to be received and when not. He furthermore agreed with the view that the statutory preconditions for the reception of hearsay evidence are now designed to ensure that it is received only if the interests of justice dictate its reception.

[8] 2017 (1) SACRS 235 (WCC) para [52]
[9] [2002] 3 ALL SA 760 (SCA)
[10] Para [12] …; [14]; and [15]

[35] The court should also in considering the hearsay evidence have regard to the factors as set out in this section before concluding that it would be in the interest of justice to admit such evidence. These are;

The nature of proceedings in this particular case, it is a criminal trial where a finding needs to be made beyond reasonable doubt, and where such evidence may play a pivotal part in the conviction of an accused person.

The nature of the evidence, which is the direct evidence of a dying declaration made by the deceased to three independent people, two of whom are police officers. The declaration implicates the appellant as the sole person who shot the deceased more than once. It is direct evidence of the deceased who was a witness to his own killing. A further and the most important considerations is the probative value of the evidence. This implies that the evidence must be considered with caution as the probative value depends on the credibility of the person who made the declaration, and it must be honest and reliable. There is no cogent reason why the deceased would specifically implicate the appellant as his assailant and state this to three people.

[36] The probative value of the evidence depends not only on the credibility and reliability of the statement made by the deceased but also the credibility and reliability of the neighbour Fortuin and the police officers to whom the declaration was made, and their evidence is without a doubt reliable and acceptable. They arrived on the scene at different occasions, and wholly independent of each other (the incident happened in a relatively small community where the deceased, Nana and the appellant were known).

In addition, the deceased did not deny that he was called “Kaiser”, nor that he worked at the municipality nor that he was in a relationship at the time with Nana. And as I said earlier, it would be absurd not to have regard to this evidence that consists of utterances made by the deceased, that was made spontaneously and unsolicited. None of the witnesses mentioned, asked the deceased what happened and more importantly, who the person was who shot him. Based on these utterances, not only the police but also Fortuin were provided with a clear and unambiguous picture of who the culprit was. This in our view, is overwhelming evidence that strengthens the reliability of the hearsay evidence, which is also strong evidence in respect of the identity of the appellant, and his direct involvement in the shooting of the deceased.

[37] The direct evidence of deceased that it was the appellant that shot him was strengthened by the strong surrounding evidence. The other reliable evidence was that of Nana who testified that the appellant had called her on the Sunday after the shooting to tell her that if the police came to look for him at her place that she must tell them that she knows nothing about the incident. This is strong evidence about the involvement of the appellant which corroborates the hearsay statements made by the deceased, that it was the appellant that shot him.

[38] A further factor to be considered is whether it would be prejudicial to the appellant. This would be obvious in a criminal trial but the overriding consideration would be whether the admission of such evidence would be in the interest of justice. And once the court reaches this conclusion, notwithstanding the fact that it might be

prejudicial to an accused person, the court must admit such evidence. In S v Ndhlovu and Others, the court held at page 328 at [50]:

> ‘‘*The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must however be discountenanced. A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'. In the present case, Goldstein J found it unnecessary to take a final view, but accepted that 'the strengthening of the State case does constitute prejudice'. That concession to the proposition in question, in my view, was misplaced. Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled; the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice.”* (our emphasis)

In this particular case, the regional magistrate correctly approached the evaluation of the hearsay evidence with caution. The admission of the hearsay evidence given the fact and circumstances of this case, does not pose a risk to the appellant’s right to a fair trial as contemplated under section 35 of the Constitution. One of the main reasons being that the appellant conceded to the admission of such evidence and did not challenge it.

[39] In summary therefore, the admissibility of the hearsay evidence was based on the consent of the appellant, who was legally represented. Our view is that it is not necessary to consider section 3(1)(c), but even if the section is applied, a

consideration of the factors therein would support the view that the admission of the hearsay evidence, objectively considered and approached with caution, was in the interests of justice.

[40] In conclusion, we state that even though the regional magistrate did not specifically refer to the provisions of the LEAA, and given the fact that there was no objection to the admission of such evidence, it cannot be said that it was not in the interest of justice to admit such evidence. The weight and probative value of the evidence was so overwhelming that it cannot be ignored.

[41] In our view therefore, the regional magistrate did not misdirect herself when she convicted the appellant on the strength of this evidence. The appeal against the conviction therefore falls to be dismissed.

[42] We therefore make the following order:

"*That the appeal against conviction is dismissed*."

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R.C.A. Henney

Judge of the High Court

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M. Pangarker

Acting Judge of the High Court