



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 480/2008

In the matter between:

ROOKSANA KARRIM

Appellant

and

THE STATE

Respondent

Neutral citation: *Rooksana Karrim v The State* (480/2008) [2011] ZASCA 230
(30 November 2011)

Coram: CLOETE, SNYDERS JJA and PETSE AJA

Heard: 4 November 2011

Delivered: 30 November 2011

Summary: Appeal – against conviction – weight to be given to further evidence by witness recanting earlier evidence – further evidence held to be lacking credence.

ORDER

On appeal from: North Gauteng High Court (Southwood J, Poswa J and Fabricius AJ, sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

PETSE AJA (CLOETE and SNYDERS JJA CONCURRING):

Introduction

[1] This matter has had a long and somewhat unfortunate history in traversing what appears to have been a tortuous road to this court .

[2] On 5 June 2002 the appellant, Ms Rooksana Karrim, was convicted in the Circuit Local Division of the Eastern Circuit District of the North Gauteng High Court sitting at Piet Retief of the murder of her mother in-law, Ayesha Fazel-Ellah (the deceased).

[3] The trial judge found that there were no ‘substantial and compelling circumstances’ present within the contemplation of s 51(3) of the Criminal Law Amendment Act 105 of 1997. That being the position – and apparently in the light of the decisions of this court, especially *S v Malgas* 2001 (2) SA 1222 (SCA) – the appellant was sentenced to life imprisonment.

[4] Aggrieved by her conviction the appellant unsuccessfully applied for leave to appeal

against her conviction and sentence. Undeterred, the appellant then sought and obtained leave to appeal from this court which was granted to the Full Court on 24 October 2002.

Moreover and pursuant to her petition to this court, the appellant was simultaneously granted leave to apply to the Full Court to lead further evidence.

[5] On 11 June 2003 the Full Court, after hearing argument, postponed the appeal sine die and granted the appellant leave to call four witnesses in her defence and to recall all the witnesses who had testified for the State at the trial. The appellant was also granted leave to testify once more in her defence, if so advised.

[6] At the conclusion of the adduction of the further evidence and after hearing argument the trial judge referred the appeal back to the Full Court for it to determine the question whether the conviction of the appellant was, on all the evidence, supportable or not.

[7] Ultimately the appeal served before the Full Court again – albeit differently constituted – which came to the conclusion that the appellant had been correctly convicted by the trial court. Consequently the appeal was dismissed on 11 December 2007. Again on 18 April 2008 this court granted the appellant special leave to appeal.

[8] On 19 May 2009, this being the date on which the appeal was scheduled to be heard in this court, this court postponed the appeal sine die because it granted the appellant, on her application, a further opportunity to lead further evidence by remitting the matter to the trial court for the hearing of the evidence of Ms Patricia Dube, who had testified at the appellant's trial in June 2001 and again in October 2003 and to 'call such further evidence as either party may be entitled to call in consequence of Ms Dube's evidence'. The State was granted leave to cross-examine Ms Dube. The trial court was furthermore requested to 'favour this court with [its] credibility findings in respect of the further evidence'. This court further directed that after the hearing of all the (new) evidence the matter should be re-instated in this court for the appeal to be heard.

[9] The appellant's application to lead further evidence by Ms Dube was solely predicated on the fact that Ms Dube was prepared to give evidence that she had lied in her previous testimony against the appellant. It was claimed that according to Dube the truth of the matter was that she was induced by threats and promises made by the investigating officer, Inspector Khaba, to falsely implicate the appellant in the murder of the deceased.

[10] Being satisfied that the appellant's application to lead further evidence satisfied the prerequisites for the adduction of further evidence, this court made the order mentioned in para 8 above. See: *S v EB* 2010 (2) SACR 524 (SCA) and the cases referred to therein.

The background

[11] The conviction of the appellant was a sequel to an incident that occurred in the deceased's home on 1 August 2000 which resulted in the death of the deceased.

[12] The appellant was initially indicted, as accused 3, together with three other persons, namely Thembi Patricia Dube (accused 1); Sibusiso Nonsana Mavuso (accused 2) and Mandla Doctor Mavuso (accused 4) on a charge of murder.

[13] Only Dube pleaded guilty to the charge, was convicted on her plea and sentenced to imprisonment for life. Mandla Doctor Mavuso escaped from police custody and apparently remains at large. The case of the appellant and Sibusiso Nonsana Mavuso was postponed for trial before a different judge.

[14] On 3 June 2002 the appellant appeared before De Vos J in the Circuit Local Division of the Eastern Circuit District of the North Gauteng High Court as the only remaining accused following the withdrawal of the charge against Sibusiso Mavuso before the commencement of the trial. Mavuso subsequently became one of the State witnesses against the appellant. The allegation against the appellant – which she denied – was that she had, in essence, arranged the murder of the deceased by

engaging her erstwhile co-accused to commit the deed.

[15] Inspector Zeeman testified that pursuant to a report that he received after the

murder had occurred he proceeded to the crime scene at the deceased's home where he found approximately 30 people both outside and inside the premises. Upon arrival he was met by Mr Faizel Ellahi who accompanied him to the last room in the house where he was shown the body of the deceased lying on the floor. He looked at the corpse and observed that there was a deep mark around the neck. Zeeman confirmed that he found the body in the position depicted in photographs 3 and 4 contained in exhibit C. There was a duvet lying on the floor next to the body. Zeeman testified that upon seeing the body he gained the impression that the deceased's neck was tied with the piece of string that was by then lying next to the body.

[16] Zeeman further testified that he found the appellant, who appeared to be in a state of shock, seated on a bed in another room. Upon speaking to the appellant the latter told him that whilst she was in her room with her six month old baby she heard the deceased screaming. Thereafter two unknown black men came into her room and tied her feet with the cord of an electric blanket. Under cross-examination he said that Mr Gangat told him that the deceased's body was covered by a duvet and a blanket when he arrived.

[17] Mr Ferhaad Gangat testified on behalf of the State. He told the trial court that on the morning of 1 August 2000 at approximately 07h30 his wife informed him that she had received a telephone call from the appellant urging her to come over immediately as something had happened to the deceased. He, together with his wife, rushed to the deceased's house where, on arrival, they were met by the appellant at the front door. Upon entering the house he and his wife began to look for the deceased. They called out her name to no avail. As they approached the deceased's room they saw a duvet and blankets strewn on the floor. He picked up the duvet and blankets and saw the body of the deceased lying on the floor. He again shouted her name 'to try and wake her up' but there was no response.

[18] They called for help whereafter Dr Ghani came to the house. When the deceased's

neck was lifted he observed that the deceased had been strangled with a shoe lace. After the string around the deceased's neck was removed by Doctor Ghani he certified her

dead. Gangat confirmed that photographs 3 and 4 in exhibit C depicted the body of the deceased in the position in which he found it when he removed the duvet and blanket that covered her – that is lying on her back with both arms folded on her chest. Gangat confirmed that all of this time the appellant was in her bedroom. He further stated that the position in which the deceased's body was on the floor – sprawled across the doorway – rendered the entry into and egress from the deceased's bedroom to reach the telephone therein without stepping on the body virtually impossible.

[19] Under cross-examination Gangat testified that he removed the duvet and blankets so that he could enter the deceased's bedroom. He further stated that although he shook the deceased to ascertain if she was alive or not, the body was not moved from its original position.

[20] Ms Thembi Patricia Dube (Dube) was the third witness called by the State. She testified that in July 2000 she was employed by Gangat. Occasionally she would also assist the deceased and the appellant in their household chores. She stated that in July 2000 she was approached by the appellant who requested her to arrange people to kill the deceased. She was also informed by the appellant that she would receive R500 for her assistance. As she knew of no one who could undertake the task she in turn approached an acquaintance, Lindiwe and informed her of the appellant's request. Lindiwe then approached two brothers Mandla and Sibusiso Mavuso who confirmed that they would be able to execute the plan to kill the deceased.

[21] The next day Dube met with the two brothers who once more confirmed their availability. She explained to them what the plan entailed and that they would be paid R30 000 for their services. Afterwards she reported to the appellant that two men had

been found to kill the deceased. The appellant, in turn, said that they must come to the deceased's house the following day.

[22] On 1 August 2000 Lindiwe arrived at Dube's place of employment and told Dube that the Mavuso brothers were waiting for her in the street. Dube went to meet them and then accompanied them to the deceased's house. Upon their arrival she knocked on the kitchen door and, in keeping with their arrangement, the appellant opened the door for them. After speaking to the Mavuso brothers in the kitchen – telling them to kill the deceased for which they would be paid – the appellant showed them the deceased's bedroom. The appellant then told Dube to leave and return to her place of work.

[23] Dube further testified that she subsequently learnt that the deceased had died. She also said that the appellant did not pay her the R500 she had promised. She was arrested on 23 March 2001 and charged with murder. Under cross-examination she stated that she did not ask the appellant to pay her the R500 she was promised because the appellant left some three days after the murder. When taxed on this she said that whenever she spoke to the appellant about payment the latter would say that she would pay her once she got the money. She further stated that she made her statement to the police freely and voluntarily. She also denied that she was present in the deceased's bedroom when the latter was accosted and killed. She reiterated that what she was telling the court was the truth.

[24] Mr Sibusiso Mavuso (Sibusiso) was the fourth witness called by the State. As he was an accomplice he was warned in terms of s 204 of the Criminal Procedure Act 51 of 1977. He testified that he and his brother Mandla were introduced to Dube who, in turn, informed them that the appellant needed someone to kill the deceased. After Dube told Mandla how much they would be paid to execute the plan they agreed that they were available.

[25] The next day they returned to Dube who then escorted them to the deceased's

home. Upon entering through the kitchen door they saw the appellant carrying a baby. The appellant gestured to Mandla who then went in the direction of the deceased's bedroom with Sibusiso following behind. Sibusiso further testified that when they entered the bedroom Mandla grabbed the deceased and requested him to look for a firearm. Unable

to find one Mandla then strangled the deceased with a shoe string which he tied around the deceased's neck. The deceased dropped to the floor at the appellant's feet. As they left the scene, the appellant suggested to Mandla that he take a video recording machine with him so as to make it appear that there had been a robbery. They left the deceased sprawled across the floor with her head in the bedroom whilst her legs were in the passage.

[26] Sibusiso further stated that the body was not covered by a duvet and blankets which were still on the bed as they left. At no stage, he said, did they tie the appellant's legs together. On the contrary the appellant was not harmed in any way as she 'never said that she should be killed', but that 'the old lady should be killed'. Sibusiso confirmed that the appellant was present when the deceased was murdered and observed the events as they unfolded.

[27] Under cross-examination Sibusiso said that he saw Dube standing inside in the house when the deceased was murdered by Mandla. He further denied that he was personally involved in the arrangement to kill the deceased. He confirmed that the statements he made to the police and the magistrate were made freely and voluntarily. He further denied that he was guilty of murder saying that he was not hired to kill anyone and that the guilty ones were the appellant, Dube and his brother Mandla. He also denied that when he went to the deceased's house with Dube and Mandla he was aware that the plan was to kill the deceased. He said he went along because Mandla had told him that he had found gardening work for him there. Sibusiso further testified that he stole the few items because he feared that if he stood by doing nothing Mandla

might also kill him. He denied that the plan was to rob the deceased nor that they were wearing balaclavas or any type of hat concealing portions of their faces.

[28] The investigating officer, Inspector Khaba, testified that after he arrested Dube and Sibusiso he took them to the police station in separate vehicles. The next day he interviewed them separately and realised that they were both co-operative. For this reason he took them to a magistrate on the following day where each separately made a

statement. Under cross-examination he denied that Dube and Sibusiso were at any stage left alone together at the police station. He further testified that when he saw the appellant at the deceased's house a few days after the murder he deduced, from her emotional state, that she was distraught. He denied that Dube was at any stage promised a reduction in her sentence or any kind of reprieve if she testified against the appellant.

[29] The appellant testified in her defence. Her version was that on the day of the murder she was in bed in her bedroom with her baby when she heard the deceased screaming. As she was about to rise from the bed to investigate, Sibusiso and an unknown man entered her bedroom. Sibusiso pushed her back onto the bed and tied her legs together around the ankles with an electric cord whilst the other man ransacked the room. A third person standing in the passage spoke to her assailants who then hastily went out. When it was quiet she untied herself and went to the deceased's bedroom. The deceased's bedding, including a duvet, was strewn on the floor. She called out to the deceased but there was no response. She testified that she telephoned her husband's cousin but could not recall who she spoke to. At this stage she was not aware that the deceased was dead in her bedroom under the duvet and blankets. When she saw Gangat's vehicle approaching she went outside to meet him, his wife, mother and someone whose identity she could not recall. When she was asked as to what had happened she responded that someone had stolen her radio. Gangat then went to the deceased's bedroom and the next thing she heard was Gangat saying that 'mommy is lying on the floor'. She went on to say that after Gangat had removed the duvet covering the deceased, he felt her pulse and then said that she

was dead.

[30] The appellant denied that she ever requested Dube to arrange people to kill the deceased saying that she could never have done so as she and the deceased had a healthy relationship. Moreover, she said that as she was unemployed, she could not afford to pay R30 000 to the killers as testified to by Dube. She also denied the evidence of Sibusiso in relation to the incident that culminated in the death of the deceased.

[31] In the event the trial court accepted the version of the State, rejected that of the appellant and consequently convicted her as charged.

Further evidence pursuant to the order by the Full Court

[32] I now turn to deal with the evidence of the three new witnesses whom the appellant was granted leave to call, namely: Ms Elma Swart, Mr Mohamed Rashid Khan, Mr Mohamed Hallen Ameer together with that of the witnesses who had previously testified at her trial.

[33] Ms Elma Swart (Swart) who worked as an Assessor for Assessco Claim Assessors testified that she was the person who investigated the claim lodged by the appellant's former husband in respect of the goods stolen from the deceased's home on 1 August 2000. To that end she interviewed both the appellant and her former husband. She was informed that on the day of the incident the deceased was in the kitchen when she was accosted by intruders. Upon hearing her scream the appellant tried to go to the deceased in the kitchen but was confronted by two intruders who tied her up and inserted a cloth into her mouth. Swart also prepared a list of the stolen goods which, in her view, could not have been removed only by three men unless loaded on a vehicle. She further testified that she was pretty sure that she read the statement made by the deceased's son to the investigation officer – which amongst others – stated that the body of the deceased was found in the kitchen. Swart further testified that she was told that Gangat had decided, on his way to work, to visit the deceased. When Gangat knocked on the front door there was no response. He went around to the back door where he saw the deceased's body

lying on the kitchen floor. Swart was told by the appellant that the deceased might have opened the door for the intruders, believing that it was her helper knocking on the door. Under cross-examination Swart confirmed that she never spoke to Gangat in relation to the information contained in her report. She further reiterated that she obtained the information she recorded from her interview with the appellant and her former husband. She also stated that if she had been specifically told that the appellant was tied up with an electric cord she would have recorded this in her notes.

[34] The second witness called, Mr Mohammed Hassim Ameer (Ameer), testified that on the day of the murder he was in Piet Retief. The deceased was his sister-in-law. By the

time he arrived at the deceased's home there was a group of people present. Upon reaching the body of the deceased he stooped over it and observed that she was strangled with a cord. He asked for a knife but did not have the courage to cut the cord. At that stage his son-in-law arrived and cut the cord – which appeared to be a shoe lace – with a pair of scissors. Ameer confirmed that, on the information he received, Gangat was the first person who arrived at the deceased's home after the murder.

[35] Mr Mohammed Rashid Khan (Khan), the third of the new witnesses, testified that he was told that there was something amiss at the deceased's house. He proceeded to the deceased's house and found, amongst others, his father in-law, Ameer kneeling next to the deceased holding a knife. Gangat was also present, albeit in the passage. Ameer was experiencing difficulty in removing the cord tied around the deceased's neck. Khan confirmed that as far as he knew the relations between the appellant and the deceased were not cordial.

[36] Mr Gangat was recalled by the State and the thrust of his evidence was that he at no stage spoke to Swart when the latter was interviewing the appellant and her former husband. He also reiterated his earlier evidence that when he arrived at the deceased's home and found the body of the deceased on the floor of her bedroom the appellant was not present but in her own bedroom. Under cross-examination he reiterated the main thrust of his earlier evidence that he did not move the body of the

deceased from where he had found it, other than tapping it on the shoulder and calling out her name. He also confirmed that Dube was at all material times employed by him. He confirmed that he did not find the body of the deceased on the kitchen floor on his arrival. It was put to Gangat, under cross-examination, that the reason why the appellant did not see the body of the deceased in the bedroom when she went to make a call there, was because it could have been lying in the kitchen at that stage. His response was that he bore no knowledge of that. He was also adamant that he found the deceased's body lying on the floor with her hands neatly folded on her chest thus showing no signs of any earlier struggle.

[37] Mr Shiraz Mohammed Elayi (Elayi) – the appellant's former husband – testified. He

was not at home when the incident occurred – as he had already left for work. On returning home he saw the deceased's body in the latter's bedroom. He confirmed that he lodged a claim for missing goods and that Swart came to interview him in regard thereto. He denied that he told Swart that on returning home he found the deceased's body in the kitchen and that Gangat came there on his own visiting the deceased before he went to

work. He confirmed that the appellant also spoke to Swart. He testified that the relationship between the appellant and the deceased was strained as the appellant hated

the deceased. Under cross-examination he confirmed that in his claim for stolen goods he

also claimed a sum of R10 000. He also denied that it was the deceased who opened the back door for him when he left in the morning saying that he always used the front door when he went to work.

[38] The investigating officer, Inspector Khaba, was also recalled. He likewise confirmed the main thrust of his earlier evidence and the content of his interview with the appellant on the day after the incident. The appellant could not tell him how the assailants gained entry into the house. He did, however, confirm that as his investigation continued he received information that the perpetrators gained entry into

the house through the back door that had deliberately been left unlocked by the appellant. As to the goods stolen from the deceased, he only recovered a video recording machine that Mandla Mavuso admitted to have stolen from the deceased's house which he retrieved from a third party. He reiterated that the information he received in the course of his investigation led to the arrest of Dube and the two Mavuso brothers who all confessed their complicity in the commission of the murder. He further said that from his investigation it was evident that murder was the primary objective of the perpetrators and not robbery.

[39] When Dube was recalled in October 2003 she, once more, reiterated her earlier evidence that she was approached by the appellant to procure people to kill the deceased. To that end she spoke to Lindiwe who, in turn, arranged the two Mavuso brothers to undertake the task. Pressed on why she never asked the appellant for payment of the

amount that she had promised to pay her, Dube gave conflicting answers. She, in one breath, said that the appellant left the area three days after the murder. On the other hand,

she said that whenever she asked the appellant to pay, the latter said she had no money and would pay once she had the money. Dube sought to explain this discrepancy by saying that she could not clearly recall how long after the murder the appellant left the deceased's house. She confirmed that she met the killers a week after the murder when they came to enquire about their reward as they also had not yet been paid. Of importance is that Dube was adamant that she had told the truth when she testified earlier that the appellant had approached her to find killers and that she escorted the killers to the deceased's house as previously arranged with the appellant. She further confirmed that it was the appellant herself who opened the kitchen door to let the killers in. She went on to say that she had applied for leave to appeal against the sentence imposed on her as she was not 'the initiator of the whole process'. She, however, disputed the suggestion put to her that her sole objective in testifying against the appellant was to secure a lighter sentence for herself. She was adamant that 'she wanted to tell the court what had happened'. Under re-examination she confirmed that when she appeared in the magistrates' court on 25 October 2001 she pleaded guilty in

terms of s 119 of the Criminal Procedure Act 51 of 1977 and made a written plea explanation in terms of which she admitted that she was approached by the appellant to procure someone to kill the deceased.

[40] The foregoing concluded the further evidence at the re-hearing. Thereafter the trial court delivered a judgment in terms of which it held that it was not open to it to revisit its earlier verdict in the light of the new evidence. It thus concluded that it was up to the Full Court to decide whether the conviction of the appellant was sustainable on the evidence adduced both at the initial trial and at the hearing of further evidence.

[41] What is remarkable about the additional evidence is that it introduced nothing of substance that had not already been dealt with, but for the evidence of Swart, which was in effect damaging to the appellant's case.

[42] In due course the appeal served before the Full Court (Southwood J with Poswa J et Fabricius AJ concurring) which dismissed the appeal.

[43] Thereafter the appellant was granted special leave to appeal to this court. Her appeal was initially scheduled for hearing in this court on 19 May 2009. Some few days before the hearing of the appeal the appellant filed an application for leave to adduce further evidence. This application was predicated on two affidavits obtained from Dube in Westville Prison in December 2008. In these affidavits Dube recanted her earlier evidence tendered in June 2002 and October 2003 and asserted that she had perjured herself on both occasions. She asserted that she was at no stage approached by the appellant as previously testified to by her. She went on to state that she had a change of heart when she was diagnosed as HIV positive and desired to clear her conscience before she died by telling the truth, which was that the appellant was innocent of any wrongdoing.

[44] Consequently this court postponed the appeal on 19 May 2009 and remitted the matter to the trial court for the hearing of the evidence of Dube and such further evidence as either party might desire to call as a result of Dube's evidence. The trial court was requested, upon hearing further evidence, to furnish this court with its

credibility findings in respect of the further evidence adduced.

Further evidence pursuant to the order granted on 19 May 2009

[45] The record of the further evidence adduced pursuant to the foregoing order is now before this court as are the credibility findings of the trial court.

[46] It will be useful to set out briefly the further evidence adduced pursuant to the order of this court issued on 19 May 2009. Following Dube's evidence three other witnesses testified, namely Khan and Mr Rayith Budai Singh (Singh) – both called at the instance of the appellant – and Khaba re-called by the State.

[47] In essence Dube confirmed: (a) that she previously testified on behalf of the State against the appellant; (b) that she implicated the appellant in the murder of the deceased as the initiator of the whole criminal scheme; (c) that on her arrest she was interrogated in the presence of Sibusiso Mavuso; and (d) that she was assaulted by Khaba who told her that their plan was not to rob the deceased but to kill her at the behest of the appellant.

Fearing that she would be subjected to further assault she accepted what Khaba dictated to her. When her brother visited her in police custody she told him what she had actually planned to do (namely robbery), but added that when Khaba would not accept this she

agreed to make a statement in the terms dictated to her by Khaba which implicated the appellant. Her brother advised her to adhere to the content of that statement and not to deviate from it for, if she were to do so, she would cause more trouble for herself. She denied that the appellant ever requested her to procure people to kill the deceased. She went on to say that Khaba told her, during his regular visits to her, that she would not be sentenced but would be released if she co-operated. On her appearance in the Piet Retief Magistrates' Court on 25 October 2001, she pleaded guilty to murder because she feared

that if she told the truth Khaba would assault her further, despite the fact that she was at that stage legally represented by Mr Stander. Although she told her legal

representative the truth she was advised that as she had already made a statement admitting to murder

her legal representative would ensure that she was not sentenced to more than fifteen years imprisonment. She perpetuated the same lie when she appeared in the high court. Her counsel in the high court explained the full implications of her plea explanation to her and enquired if she still adhered to such explanation, which she confirmed.

[48] Dube testified that her sole objective was to commit robbery to augment her meagre salary as she had two children to maintain whose father was deceased. She said that she gave false evidence against the appellant because she was merely repeating what Khaba had told her and hoping that she would be sentenced leniently. She said that now that she was HIV positive it pained her to see the appellant suffering for something she never did. She also testified that in December, whilst in prison, she was visited twice by two gentlemen who obtained statements from her, one on 8 December and the other on 21 December 2008.

[49] Dube denied that she was paid money by the family of the deceased to recant her earlier evidence. She denied further that she ever saw the appellant on the day of the murder. She nevertheless said that she expected that the appellant would be present in the house when she escorted the Mavuso brothers there but not the appellant's husband

who would have left for work by then. Under cross-examination Dube accepted that no mention was made in her statement of 4 December 2008 that she was assaulted by Khaba although she persisted in saying that she had mentioned that to the attorney who recorded the statement. Her claim that she was promised a lenient sentence was also not mentioned. Neither did her statement taken on 23 December 2008 mention either of these two occurrences. Her explanation for this glaring omission was twofold:

(a) that those who

took her statement had promised to come back again; and (b) that she had forgotten about these occurrences. She conceded that the reason furnished in her statement for the recantation of her earlier evidence was that in court she gave evidence against the

appellant because she was scared and said 'whatever came within [her] mind'.

[50] Dube conceded that she only mentioned for the first time on 30 April 2009 that she was assaulted by Khaba on 24 March 2001. She said that it would not have served any purpose to mention this after she had already been sentenced. Nor did anyone ever ask her about that. She could not proffer any cogent reason why she failed to mention the assault when she testified against the appellant – not just once, but twice – for at that stage she accepted that Khaba could no longer assault her. Her implausible response was that she was neither asked about him nor afforded an opportunity to write her own statement as to what had happened. Neither does her assertion that her prison inmates inspired her to speak out and tell the truth explain why it took her two years to do so and even then only after three visits to her. On re-examination Dube said that she pleaded guilty to murder because she was accepting responsibility for what her cohorts did in that they murdered the deceased when the plan was merely to rob her. She further said that her cohorts wore hats that concealed their faces.

[51] Khan, the appellant's brother-in-law, also testified. The tenor of his evidence was that after the appellant was sentenced to life imprisonment the appellant's family commissioned a private investigator, Mr Phillip Lemmer, to investigate the matter. To that end he and Lemmer visited Dube in prison in 2008 who was unwilling to talk to them, save to say that the appellant was not implicated in the murder of the deceased. Later they

instructed an attorney in Umzimto, Mr Essop, to obtain a statement from Dube. He was

accompanied by Mr Singh, a police officer, whose role was merely to facilitate access to

Dube. A statement was obtained from Dube which was faxed to Mr Jaffer, the appellant's

attorney, who was not entirely satisfied therewith. Consequently Essop obtained a second statement from Dube. Khan testified that the appellant's family embarked on this exercise because the appellant maintained that she was innocent. Khan, himself an attorney, was unable to give a satisfactory answer to the question posed to him by

counsel for the State that in none of her two statements did Dube mention that she was assaulted by Khaba; that she was told by Khaba what to say and that she was promised a lenient sentence. He contented himself with merely saying that he left it to Mr Jaffer and counsel to advise the family on what could and should be done under the circumstances.

[52] Singh's evidence was not of a material nature. He testified that as a member of the South African Police Service he accompanied Essop to Westville Prison where Dube was incarcerated principally to facilitate Essop's access to Dube. He further said that during these two visits Dube was never asked if she was ever assaulted or why she pleaded guilty to murder. Nor was she asked why she had by then decided to recant her earlier evidence implicating the appellant. However, he confirmed under cross-examination that Dube never mentioned that she was assaulted or told what to say or promised a lenient sentence. He had no independent recollection of what Dube said during the two interviews with them.

[53] Khaba was recalled by the State. In his further evidence he reiterated his earlier version. In particular he testified that: (a) from the outset he was investigating a case of murder and not robbery; (b) that upon her arrest Dube was co-operative; and (c) she was never assaulted, told what to say or promised a lenient sentence. He confirmed that as a consequence of this co-operation she was taken to a magistrate for a statement which, in

the main, accorded with her earlier testimony at the appellant's trial and her plea explanation in the magistrates' court. Under cross-examination Khaba was adamant that Dube was arrested for murder. Khaba was also adamant that not only did Dube incriminate herself in the murder, but also implicated the appellant whom she said was the prime initiator of the criminal scheme to kill the deceased because, as she put it, 'the old woman was ill-treating her'.

[54] At the conclusion of the adduction of evidence the matter was adjourned. Counsel were requested to file written heads of argument given that the trial court was directed by this court to furnish its credibility findings in the light of the further evidence.

Trial court's credibility findings

[55] In formulating its credibility findings the trial court also had regard to certain documentary evidence tendered by agreement between the State and the defence. The most significant of those documents were two hand-written affidavits made by Dube on 8 and 23 December 2008 respectively and a further affidavit deposed to on 30 April 2009 that was filed in support of the application to lead further evidence launched in this court on 8 May 2009.

[56] The trial court noted that when she testified for the third time on 4 May 2010, Dube sought to recant her earlier evidence tendered both in 2002 and 2003. The thrust of Dube's earlier evidence was that the appellant solicited her assistance in finding people to kill the deceased which she did. Dube testified that she falsely implicated the appellant in the murder because: (a) Khaba had coerced her to do so; (b) the assault that she suffered at the hands of Khaba had instilled fear in her which drove her to plead guilty to murder thus perpetuating a lie; (c) that if she adhered to this lie she would receive a lighter sentence; (d) her brother too advised her not to deviate from the version dictated to her by Khaba; and (e) her legal representative, despite being told what the true state of affairs was, also advised her to adopt Khaba's version of the events in the expectation that she would not be sentenced to more than fifteen years of imprisonment.

[57] Also, when Dube appeared before Els J she pleaded guilty and in her written statement under s 112(2) of the Criminal Procedure Act adopted the version that incriminated her and implicated the appellant. She was consequently convicted on her plea and sentenced to life imprisonment.

[58] When she testified against the appellant at the latter's trial she was serving a term

of life imprisonment. Moreover the fear of further assault by Khaba was no longer a

factor.

In the face of these factors she still implicated the appellant, not just once at the initial trial,

but again when she was recalled to give further evidence for purposes of the appellant's appeal to the Full Court. On these two occasions she was unequivocal that the appellant was the mastermind behind the murder of the deceased.

[59] The trial judge found Dube to be an unimpressive and untruthful witness when she

testified in May 2010 and sought to recant her earlier evidence which the trial court had found satisfactory and reliable.

[60] On the question of Dube's demeanour the trial court said the following:

'The demeanour of Miss Dube in the witness box did not inspire confidence in the truth of her evidence. She refused to look at the bench in spite of the fact that she was asked questions from the bench. She spoke very softly especially when giving answers to difficult questions, for instance when asked about the reasons for her original plea of guilty in the High Court in front of Els J she had to repeat her answers so that they could be heard. She furthermore spoke about emotional issues without any indication of emotion either on her face or in her voice as one would expect for example, describing her HIV status, describing giving the reason why she has decided to tell the "truth", explaining how she was assaulted by Xaba and explaining why she implicated the Appellant.'

[61] In summing up its evaluation of Dube's evidence – given in May 2010 – in the light of inherent probabilities the trial court found that: (a) Dube's evidence recanting her earlier evidence was particularly lacking in detail in contrast to the graphic details of her earlier evidence; (b) the improbability of a person of Dube's intelligence pleading guilty to murder if she was indeed innocent; (c) the lack of any discernible motive that could be ascribed to Xhaba for falsely implicating at least four persons in the deceased's murder, namely: Dube, appellant and the two Mavuso brothers; and (d) corroboration of Dube's initial version by some objective factors.

Discussion

[62] It will be convenient to deal first with the further evidence adduced before the trial

judge in May 2010. What this court must determine is whether the further evidence led in

May 2010, more particularly the evidence of Dube which was the basis for the grant of the order made by this court on 19 May 2009, is credible and points to the evidence originally given by Dube as false. Following this court's decision in *R v Van Heerden & another* 1956 (1) SA 366 (A) at 372B, Dube's latest evidence cannot be merely accepted at its face value to conclude that she perjured herself in her earlier evidence both at the trial and again when she reiterated her earlier evidence in October 2003.

[63] In *Ladd v Marshall* [1954] 3 ALL ER 745 at 748, a case quoted with approval by Centlivres CJ in *R v Van Heerden*, Denning LJ said that:

'A confessed liar cannot usually be accepted as credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion'.

[64] Although these remarks were made in the context of an application for a re-trial and relied upon by this court in the context of an application to lead further evidence, it is my view that by parity of reasoning they apply with equal force in this case despite the fact that the appellant had already been granted leave to lead further evidence from Dube, following her recantation of her earliest evidence given not just once but twice. There is all the more reason in this case to adopt a cautious approach when considering Dube's further evidence given in May 2010 if regard is had to the fact that at her own trial she, on two occasions, gave plea explanations which in substance accorded with her evidence at the appellant's trial, leaving aside for a moment the influences that she claimed had a bearing on those plea explanations.

[65] This court must of course defer to the trial court's credibility findings more particularly given the care with which they appear to have been arrived at. This is particularly so having regard to the advantages enjoyed by the trial court which was steeped in the atmosphere of the trial and had the opportunity of observing the

demeanour of the witnesses. See *Rex v Dhlumayo & another* 1948 (2) SA 677 (A). There is nothing to suggest, from a reading of the record, that such findings do not accord with the wider probabilities of the case. Compare *Medscheme Holdings (Pty) Ltd & another Bhamjee* 2005 (5) SA 339 (SCA) para 14.

[66] The trial court found that the evidence given by Dube in May 2010 could not be accepted as credible. It gave comprehensive reasons for reaching that conclusion. To my mind that finding cannot be faulted. A few examples will illustrate this point. It took Dube almost eight years to tell what she then claimed was the truth when she made her two statements to Mr Essop on 4 and 23 December 2008 respectively. In neither of these two statements is it recorded that Khaba had assaulted her, told her what to say in her statement and promised her a lenient sentence. Had she mentioned those reasons to Mr Essop it is inconceivable that Mr Essop would have omitted to record such crucial information in her statements.

[67] As to the claim that she feared that Khaba would assault her if she deviated from what he allegedly told her to say, it is difficult to understand why she told the version she gave at the appellant's trial not just once, but twice at a stage when Khaba no longer had

access to her as she was no longer in police custody. When she testified against the appellant she had already been sentenced to life imprisonment. Thus it must have been plain to her by then that the promise of a lenient sentence was no longer feasible and yet she persisted in her earlier version, again not just once but twice. On each of these two instances she confidently testified that she was telling the truth and that the appellant's denials of what she said were untruthful. It was, however, contended on the appellant's behalf that the defence was not informed of the observations of the trial judge and thus could not comment on the aspects mentioned by the trial judge in her credibility findings. In my view this argument is unavailing. It was a specific request to the trial court 'to favour this court with her credibility findings' in respect of the further evidence. The trial court pertinently drew counsel's attention to this request and gave them the opportunity to argue and file written heads of argument. Demeanour was therefore relevant. The trial judge was not obliged to put her impressions to counsel. In any event it was not suggested that the trial court's credibility findings were wrong or

not justified.

[68] Counsel for the appellant advanced an alternative argument in this court the upshot of which was that in the event that the evidence of Dube is not accepted, there was still no evidence of sufficient weight against the appellant to sustain her conviction.

[69] To a great measure the State relied on the evidence of Dube and Sibusiso in its case against the appellant in addition to the evidence of Zeeman, Khaba and Gangat.

Evidence of an accomplice

[70] It is again plain from a reading of the record that both Dube and Sibusiso were accomplices hence Sibusiso, against whom the charge was withdrawn before the commencement of trial, was warned by the trial court in terms of s 204 of the Criminal Procedure Act 51 of 1977. Thus their evidence should be approached with caution for a variety of reasons. The cautionary rule to be applied to accomplices was described in these terms by Holmes JA in *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440D–H: 'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. 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 description – his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular *R v Ncanana*, 1948 (4) SA 399 (AD) at pp. 405-6; *R v Gumede*, 1949 (3) SA 749 (AD) at p. 758; *R v Nqamtweni & another* 1959 (1) SA 894 (AD) at pp 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon appraisal of all the evidence and the degree of the safeguard aforementioned.'

[71] Although the evidence of Sibusiso is not without blemishes, as he sought to

minimise his role in the murder, it corroborates in some material respects Dube's evidence. As to the proposition that the evidence of an accomplice can provide corroboration, see *S v Avon Bottle Store (Pty) Ltd & others* 1963 (2) SA 389 (A) at 393H;

S v Hlapezula & others at 440H. As to Dube's original evidence it is evident that she implicated the appellant in the murder. Dube had no motive to falsely implicate the

appellant and none was suggested either in this court or the trial court. Dube was, for example, asked by the trial court when she testified in May 2010 what the appellant did to her that made her give false evidence against the appellant. Her unequivocal answer was that the appellant had done nothing wrong to her. What makes it even more difficult, in my view, to understand why Dube would have fabricated evidence implicating the appellant, is the telling factor that Dube was clearly conscious that her version was also self-incriminating.

[72] However, there is yet a further crucial safeguard reducing the risk of a wrong conviction consisting of the fact that the appellant's evidence as to what happened on the day of the murder falls to be rejected. She was patently a mendacious witness. Thus the corroboration of Dube's evidence in some respects by Sibusiso renders the appellant's version even less probable. See *S v Gentle* 2005 (1) SACR 420 (SCA) at 430j–431a. The appellant's case is riddled with a number of improbable features. Highlighting some of those would, in my view, be sufficient to illustrate the manifest implausibility of her version.

The appellant testified that she realised that there was a problem in the house when she heard the deceased scream. But after the intruders had left she was content – when the deceased did not respond when she called her – to leave matters at that believing, as she said, that she was fine wherever she was. After some vacillation she eventually conceded under cross-examination that when she went to and from the telephone in the deceased's bedroom she could not have failed to step over the deceased's body which was on her path to the telephone and covered by blankets and the duvet. The statement made to Swart was to the effect that the intruders had accosted and strangled the deceased in the kitchen. That the appellant was the source

of this version is confirmed by the fact that it was put to Gangat, under cross-examination on her behalf, that the deceased was attacked and killed in the kitchen and her body later dragged to the bedroom. Plainly this version was put forward to bolster the notion that it was the deceased who opened the kitchen door through which the intruders gained entry into the house.

[73] The appellant testified that after the two intruders had hastily left her bedroom it was quiet thereafter and it was only then that she felt it safe to go and make a call for help.

There would thus be no basis to suppose that the killers had later come back, removed the body from the kitchen and left it in the bedroom covered by a blanket and duvet with the deceased's hands neatly folded on her chest. That the killers would have done all of this is as improbable as it is fanciful. But the evidence of Sibusiso provides an answer to this. The deceased was, according to him, strangled, dropped to the floor and left by the killers lying there partly in the bedroom and partly in the passage, uncovered.

[74] Moreover, if the intention of the intruders was to commit robbery and the killing of the deceased was incidental, it is again hard to understand why the intruders would have left her unharmed as the appellant testified. The intruders were, according to her version, aware of her presence, she had the opportunity to recognise them as their faces were not masked and she in fact identified Sibusiso at the trial as the person who tied her up with an electric cord. Of course Sibusiso said that the appellant was present with them when Mandla strangled the deceased to death. When they were leaving the appellant suggested that they remove a video recording machine so as to create the impression that the intruders came there to commit robbery.

Conclusion

[75] To my mind the foregoing factors considered cumulatively cast a shadow on

the appellant's credibility. Thus the credibility findings of the trial court made in May 2010, the upshot of which is that the earlier evidence given by Dube was truthful and reliable when contrasted with her later version recanting her earlier evidence are indeed, as the trial judge found, reinforced by the coherence of her earlier versions despite the fact that

those earlier versions contained minor internal – but not material – contradictions. Considered in the context of the evidence in its totality, Dube's earlier version clearly dispels any notion that it was a product of fabrication calculated to serve a particular end, namely to falsely secure the appellant's conviction. Moreover, if one accepts the evidence of Gangat as to where the body of the deceased was when he discovered it – bearing in mind that it is common cause that he was the first person to arrive after the intruders had

left – such evidence undermines, in a fundamental way, the thrust of the appellant's evidence thus rendering it highly implausible. It bears repeating that Gangat saw that the

deceased's hands were folded on her chest when he discovered the body. It is inconceivable that the person who strangled the deceased would have done this. The deceased could not herself have folded her arms in this way. The inference is therefore irresistible that it was the appellant who did this.

[76] To sum up, the trial judge was acutely alive to the need to approach the evidence of Dube and Sibusiso with the requisite caution that the circumstances of the case demanded. She took cognisance of the shortcomings in their evidence and weighed the State's evidence against that of the appellant in reaching the conclusion she did. That conclusion cannot be faulted.

[77] The foregoing conclusion renders it unnecessary to deal with numerous other submissions made in the appellant's heads of argument for none of them, in my view, detract from that conclusion.

[78] In the result the appeal is dismissed.

X M Petse
Acting Judge of Appeal

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