THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non reportable

Case No: 574/2014

In the matter between:

TINKY SOPHIE MOJAPELO **FIRST APPELLANT**

ANTOINETTE NKHESANI MASUKU **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mojapelo v The State* (574/2014) [2016] ZASCA 22 (18 March 2016)

Coram: Lewis, Tshiqi, Petse, Willis and Saldulker JJA

Heard: 17 February 2016

Delivered: 8 March 2016

Summary: **Criminal Law:** Whether the State proved beyond a reasonable doubt that appellants are guilty of murder where the only evidence is that of an accomplice, warned in terms of s 204 of

the Criminal Procedure Act 51 of 1977, who was found to be untruthful and whose evidence was uncorroborated.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Ledwaba, Tuchten and Louw JJ sitting as court of appeal).

The following order was made on 17 February 2016:

1 The appeal is upheld.

2 The convictions and sentences of both appellants are set aside.

JUDGMENT

Saldulker JA (Lewis. Tshiqi, Petse and Willis JJA concurring):

Introduction

[1] After hearing the parties in this matter, the appeals of both appellants were upheld and their convictions and sentences were set aside with reasons to follow. These are the reasons.

[2] The appeal turns on the question whether the trial judge's findings, based entirely on evidence of an accomplice, which was disbelieved by the judge, were correct. On the night of 28 September 2005, a red Toyota bakkie belonging to Mr Albert Mojapelo was discovered in a deserted patch of veld by an Inspector Makhuba, some distance from a public road, in the vicinity of Orange Farms. Next to the bakkie lay Mr Mojapelo, who had been shot in the head and had died. It was common cause that at the scene of the murder were a Mr Orlando Mandoza and a Mr Sakhele Malwane. The appellants, Ms Sophie Tinky Mojapelo (the first appellant), and Ms Antoinette Mkhentsane Masuku (the second appellant) were charged

together with Mr Mandoza in the South Gauteng High Court (Vereeniging Circuit) (Satchwell J), with six counts, namely, conspiracy to commit murder, kidnapping, murder of the deceased (the first appellant's husband), contraventions of the Firearms Control Act 60 of 2000 for the unlawful possession of a firearm and ammunition, and pointing of a firearm. Mr Mandoza, who was the third accused at the trial, absconded after having been released on bail in the magistrate's court, and the trial proceeded against the two appellants only.

[3] On 18 June 2009, Satchwell J convicted both appellants of the murder of the deceased and sentenced them to life imprisonment. They were acquitted of the remaining charges. On 19 June 2009, the trial court granted the appellants leave to appeal to the full court of the North Gauteng High Court, Pretoria against their conviction and sentence. The full court (Ledwaba, Tuchten and Louw JJ concurring) dismissed their appeal.

[4] Initially, special leave to appeal to this court was sought only by the second appellant. Special leave was granted to her. But it was only after this court drew the first appellant's attention to the fact that the second appellant's appeal was to be heard on 17 February 2016, that she also applied for leave to appeal. In the event, the first appellant's application for special leave was made on the day of the hearing of this matter, and it too was granted. Consequently both appellants were before this court.

[5] The issue before this court is whether the State discharged the onus of proving beyond a reasonable doubt that the appellants committed the murder. In this regard, the State relied on the direct evidence of Mr Malwane, who is a single witness, and an accomplice, who was warned by the trial court in terms of s 204 of the Criminal Procedure Act 51 of 1977 (the CPA). His evidence formed the foundation of the State's case against the appellants. The trial court made certain credibility findings in respect of Mr Malwane, and it will become necessary to deal with his evidence in some detail. There are limited grounds on which an appeal court

will interfere with the credibility findings of a trial court.[1] This appeal consequently turns, as I have said, on the question whether Mr Malwane's evidence was correctly accepted by the trial court and the full court. Counsel for the appellants raised several other issues before us, but in light of the conclusion that I reach on the merits of the matter, it will not be necessary to consider all of these.

The facts according to Mr Malwane

[6] Mr Malwane was employed by the deceased and the first appellant as a driver in their diverse array of businesses, including selling and installing of curtains and gardening services. He testified that some months after he had been employed by them, the first appellant reported to him that she had been told by her friend, the second appellant, that she should kill her husband, because she (the second appellant) no longer had a husband and that it would be better for the two of them to be widows. He refused to be a part of this plan, he said, and in fact threatened to inform the South African Police Service if the deceased was killed. Nevertheless, so his evidence went, despite this initial resistance and threat he remained involved in the further discussions surrounding the plan. He said that some time later he was present when a meeting to discuss the plan was held between the appellants and Mr Mandoza. However, on this occasion, the appellants and Mr Mandoza agreed to abandon their plan to murder the deceased. But this was not the end of the matter. They agreed that it would be necessary to pay Mr Mandoza R3 000 in order to ensure that he did not kill the deceased. The reason for this was, it would seem, that Mr Mandoza had already prepared the 'muti' for the deceased's murder. Some days later he saw the appellants pay an amount of money to Mr Mandoza, ostensibly to ensure that the deceased would not be killed.

[7] Mr Malwane testified that he was at the deceased's home on the night of the murder. He said that it was intended that he would drive with the deceased to his house and be dropped off there. Shortly before he and the deceased left in the deceased's bakkie, the first appellant borrowed his cellular phone and made a phone

[1] *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706.

call to Mr Mandoza. On the way to Mr Malwane's house, another motor vehicle forced them to stop. They were hijacked by Mr Mandoza and three others, two of whom were armed with firearms. The deceased was placed in the rear seat of the bakkie and restrained by two of the hijackers. Mr Malwane was instructed at gunpoint to drive the bakkie to a deserted patch of veld, where the deceased was shot in the head and killed by one of the four men.

[8] Mr Malwane testified that he was assaulted by the hijackers, and although there was some discussion about killing him too, Mr Mandoza ordered his cohorts not to do so. He was given a lift back to his house by the assailants, and instructed to telephone the first appellant and inform her that the 'job was done', which he did. He kept the keys of the deceased's bakkie, which he hid in the veld near his house. His explanation for this action was that he thought that it would make his story more credible to the police. He claimed that he was threatened by Mr Mandoza and the appellants not to inform anyone of what had transpired. It was only some days later, following the murder, that he revealed to a Captain Mankgwe that the appellants were responsible for the death of deceased.

[9] It was Mr Malwane's testimony that there had been constant communication between the first appellant and Mr Mandoza, using Mr Malwane's cellular phone, which the first appellant had constantly borrowed. Significantly, no cellular phone records were presented by the State demonstrating any communication between the first appellant and Mr Mandoza. The cellular phone records which were produced by the defence during the trial indicated, however, that there was communication between Mr Malwane and Mr Mandoza.

[10] Two other witnesses were called by the State, Ms Makgato (the sister of the deceased) and Ms Soldat. The latter testified to certain events prior to the murder of the deceased where the appellants had discussed with her the proposed purchase of two vehicles. Secondly, the second appellant had enquired about the time it had taken for an insurance pay-out following the death of Ms Soldat's husband. Ms

Soldat's evidence was of no consequence and the trial court correctly placed no reliance on it.

[11] Following her arrest, the first appellant was detained at the Ennerdale Police station. Ms Makgato testified that she had visited the first appellant at the police station, and that, when the first appellant saw her she spontaneously uttered the following statement: 'I am asking you to forgive me. I do not know what got into me. Satan has power'. The trial court held, given the context of the statement, the only reasonable inference that could be drawn was that the first appellant was acknowledging responsibility for the murder of the deceased. That was the State's case against the appellants.

[12] The appellants then applied for a discharge in terms of s 174 of the CPA. This was refused by Satchwell J. The appellants did not testify in their defence and called witnesses whose evidence did not advance their case.

The reasoning of the trial court

[13] In her judgment convicting the appellants, Satchwell J found that Mr Malwane's version of the events 'does not make sense', was 'bizarre', 'nonsensical', and 'unbelievable', so much so that she failed to make an order discharging Mr Malwane from prosecution. I do not propose to deal with each of the points advanced by the trial court for these adverse findings against Mr Malwane. The following excerpts from the trial court's judgment suffice:

'On Mr Malwane's evidence there was no reason for anyone ever to tell him about any plan that had ever been hatched to kill Mr Mojapelo. According to him he was never asked to do anything in connection with Mr Mojapelo's killing. According to him he never agreed to do anything. The sharing of this plot informing him of this criminal conspiracy was, according to Mr Malwane, for no purpose whatsoever. . . .

Secondly, according to Mr Malwane, he immediately expressed reluctance, indeed shock, from the outset. His first reference was to the South African Police. Yet, having been so

reluctant and so shocked, according to Mr Malwane, had accused 1 and 2 continued to keep him informed of the outcome of their earlier plans. He was taken to the meetings with Orlando [Mr Mandoza], he was told about and he observed the payment of money. . . .

Thirdly, the sum of R3 000 from his funds, which featured in his evidence, was never demanded from him in connection with the killing of Mr Mojapelo or the non-killing of Mr Mojapelo. According to him his assistance was never sought in connection with the killing or non-killing of Mr Mojapelo, he simply offered the money out of fear that he would been harmed because he had known about their plans, now abandoned. . . .

Fourthly, the entire import of Mr Malwane's evidence is that there was a criminal conspiracy but there was no longer a criminal conspiracy, the fact that this criminal conspiracy had been abandoned before it was carried out . . .

. . . . It is inexplicable that there could even have been a plan that Mr Malwane not know about it if he was so continuously involved in all these events. After all, he claims that he was not needed and he was never asked to do anything. After all, it would be very unsafe and dangerous for perpetrators to a murder to reveal everything to somebody who was innocent and uninvolved. After all, Mr Malwane is a person who claims that he had shown reluctance or repugnance and had even made reference to the South African Police. And finally, of course, notwithstanding this plan and everything that went on, Mr Malwane never did tell Mr Mojapelo. . . .

On Mr Malwane's own version, I must conclude that his protestations of innocence are not believable and are not credible. If anything was going on then he knew exactly what was happening. . . .

All these questions, all these discrepancies and all these nonsensical versions are immediately resolved if one understands that every piece of evidence that is nonsensical is nonsence simply because it seeks to render Mr Malwane innocent of any wrongdoing. Once one accepts that indeed he was involved in the events he describes then his evidence is explicable. . . .

It is my finding that Mr Malwane was an accomplice to the plan he describes. It is my finding that Mr Malwane was probably a perpetrator in one or more ways of this conspiracy. Months in advance he was told about what was planned to happen. He was taken to a meeting with Orlando. He was told about the need for money. He saw Orlando being paid money. He was clearly considered trustworthy enough on his version to be party to all these plans.'

[14] From all of the above, it is obvious that the trial court appeared to recognise that Mr Malwane's evidence was unbelievable, fraught with inherent improbabilities and nonsensical. Although the trial court understood and appreciated that there must be safeguards in place when relying upon the evidence of an accomplice, especially corroboration of material parts of an accomplice's testimony, nevertheless, the trial court accepted that Mr Malwane's version of the events was generally convincing, except to the extent that it portrayed him as an innocent bystander. It found that it was only that aspect that was inherently improbable and ridiculous, and the remainder could safely be relied upon. Relying on *S v Francis* [1990] ZASCA 141; 1991 (1) SACR 198 (A), the trial court said that it is not expected that the evidence of an accomplice witness should be wholly consistent and wholly reliable, or even wholly truthful, since the ultimate test after due caution is whether the court is satisfied that the essential features of the story that 'he tells is a true one'. The trial court concluded that the 'one inconsistency which ran like a golden thread through Mr Malwane's evidence was his ridiculous attempt to persuade the court that he was ignorant of what was going on'. This 'golden thread of inconsistency' led the trial court to conclude that he was an accomplice, and it was only this 'golden thread' that was false, and that the remainder of Mr Malwane's evidence, (apart from that to exculpate himself) was of probative value. And that the only 'unreliable aspect' of Mr Malwane's evidence, so held the trial court, was that a cellular phone exchange had taken place between the first appellant and himself following the murder during which he had informed the first appellant that the 'job' was done. On this aspect, as noted, it is significant that the State did not make available the cellular phone records of the first appellant, and thus the State failed to prove that there was in fact such an exchange.

[15] Mr Malwane's evidence is replete with inconsistencies and lies to the extent that one is unable to discern the truth from the lies. It is illogical that the trial court, having found that Mr Malwane was untruthful in so far as his complicity was concerned, nevertheless chose to believe that part of his testimony that the two appellants had conspired to murder the deceased despite its improbability. Almost a century ago, Solomon J in *R v Kumalo* 1916 AD 480 at 484, stated that where a witness is untruthful on aspects of importance, there should be a good reason to

justify a court finding that other aspects of his evidence are the truth. Clearly there were no 'good reasons' to justify the acceptance of Mr Malwane's evidence by the trial court. The trial court in effect speculated that the evidence incriminating the appellants must be true while that exculpating Mr Malwane was false. Even if that evidence was thought to be true, it was in all the circumstances so improbable that it should have been rejected on that basis alone.

[16] It is trite that a court should approach the evidence of an accomplice with caution, and courts are repeatedly warned of the 'special danger' of convicting on the evidence of an accomplice. In *R v Ncanana* 1948 (4) SA 399 (A) at 405, this court said:

'The cautious Court . . . will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What *is* required is that the trier of fact should warn himself . . . of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone; . . . The risk that he may be convicted wrongly . . . will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused.' See *also S v Hlapezula & others* 1965 (4) SA 439 (A) (cited with approval in *S v Scott-Crossley* [2007] ZASCA 127; 2008 (1) SACR 223 (SCA) para 7).

[17] This court expressly stated in *S v Mhlabathi & another* 1968 (2) SA 48 (A) at 50G-51A, cited with approval in *S v Makeba & another* [2003] ZASCA 66; 2003 (2) SACR 128 (SCA) para 12, that:

'. . . [T]he Court should warn itself of the peculiar danger of convicting on the evidence of the accomplice and seek some safeguard reducing the risk of the wrong person being convicted, but such safeguard need not necessarily be corroboration. Once however the Court decides that in order to be so satisfied it requires corroboration, it would be pointless to look for corroboration other than corroboration implicating the accused.'

[18] In instances where conspiracy is involved, there must be at least some reliable evidence which specifically links the accused to that conspiracy. In *S v Eyssen* [2008] ZASCA 97; 2009 (1) SACR 406 (SCA) para 12, this court considered the statement of a s 204 witness who was a member of a criminal gang, and who had testified against the other gang members. This court stated that the s 204 witness was a 'particularly dangerous witness', who could have put any of the accused at any scene. Accordingly, this court emphasised that corroborating evidence meant 'corroborated by evidence implicating an accused'. There was none in this case.

[19] The trial court did not consider the aforegoing 'golden thread of inconsistency' in Mr Malwane's testimony as a fundamental flaw in the State's case. It concluded that Mr Malwane's evidence, which was that of an accomplice, along with the statement attributable to the first appellant by Ms Makgato, which it regarded as incriminating, was sufficient to create a prima facie case against the appellants. As neither of the appellants elected to testify at the trial, the trial court reasoned that they did not rebut the prima facie case against them, and, accordingly, there was proof beyond a reasonable doubt in accordance with the principles laid out in *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC) (especially para 24). In my view the trial court misdirected itself in reaching this conclusion. One cannot accept the trial court's reasoning that the alleged utterances of the first appellant to Ms Makgato constituted an acknowledgement of her guilt in her husband's murder, and were thus corroborative evidence for Mr Malwane's evidence. It is clear from the aforegoing authorities that corroboration means 'corroboration implicating the accused'. The alleged statement by the first appellant to Ms Makgato was neither clarified nor explained. One would have expected Ms Makgato to be shocked and outraged on hearing the statement. Instead, she appears to have ignored the utterances by the first appellant, testifying that she was concerned with discussing the funeral arrangements for the deceased and finding his identity document. We simply do not know what the first appellant's statement meant.

[20] It is extraordinary that the trial court found that a prima facie case had been made out if the only evidence implicating the accused presented by the State at the end of its case was the unreliable, uncorroborated and flawed testimony of an accomplice. In the circumstances of this matter, the appellants' failure to testify did not justify the trial court's finding that the State had proven its case beyond a reasonable doubt against the appellants. The trial court appears to have ignored other parts of the judgment in *S v Francis* [1990] ZASCA 141; 1991 (1) SACR 198 (A) at 203 G-H, where Smalberger JA pertinently observed that:

'As stated by Greenberg JA in *Shenker Brothers v Bester* 1952 (3) SA 664 (A) at 670G, "the circumstances that evidence is uncontradicted is no justification for shutting one's eyes to the fact, if it be a fact, that it is too vague and contradictory to serve as proof of the question in issue".'

Reasoning of the full court

[21] The full court largely confirmed the correctness of Satchwell J's conclusion. It did not engage in any meaningful way, as it was enjoined to do, with the reasoning of the trial court on the facts or law. The full court was alive to the fact that Satchwell J had branded Mr Malwane as untruthful and his evidence as bizarre, and nonsensical. Yet it reasoned that Satchwell J had 'entirely correctly, adopted an holistic approach to the evidence before her', which they regarded as 'ample', and held that there 'was no misdirection on the part of the trial judge in the evaluation of the evidence of Mr Malwane'. I disagree. Although a court of appeal generally defers to a trial court's factual findings, this does not exonerate it from carrying out a careful, critical and detailed examination of the whole body of the evidence to satisfy itself that the findings of the trial court are correct. Not to do so would be abdicating its responsibility as a court of appeal. In light of what has been discussed above, it is obvious that the full court did not thoroughly analyse the judgment of the trial court.

Complaints regarding the conduct of the trial

[22] The appellants have raised a number of complaints in regard to the manner in which their trial was conducted. It is not necessary to deal with these aspects in any

detail. It suffices to mention a few. The appellants complain that Satchwell J refused an application in terms of s 174 of the CPA for their discharge at the end of the State's case. This can be disposed of shortly. A refusal to grant a discharge is not appealable.[2] Nevertheless, in the light of the trial court's finding that Mr Malwane was untruthful and his evidence nonsensical and bizarre, it is astonishing that Satchwell J did not discharge the appellants where there was no credible prima facie evidence implicating them. The credibility of a witness is not normally a factor at the stage of a consideration of a discharge in terms of s 174 of the CPA, but it may be taken into account where a very high degree of untrustworthiness has been shown. See *S v Mpetha & others* 1983 (4) SA 262 (C) at 265D-G. The test is whether there is no evidence upon which a reasonable judge acting carefully may convict.[3]

[23] The appellants have also raised complaints of incompetence in respect of some of their legal representatives. There appears to be little merit in these accusations. They have also complained about the conduct of the trial judge during the course of the trial. Having regard to the trying circumstances in which the trial was conducted (numerous postponements occasioned by changes in the appellants' legal representatives) Satchwell J's repeated expressions of frustration were understandable.

Conclusion

[24] There was an absence of reliable and credible evidence against the appellants. The trial court was clearly wrong in finding that the appellants' guilt was proved beyond a reasonable doubt. Hence the convictions should not have been allowed to stand by the full court.

[25] In the result the following order was made on 17 February 2016:

---

[2]See *R v Lakatula & others* 1919 AD 362.

[3] *R v Shein* 1925 AD 6.

1 The appeal is upheld.

2 The convictions and sentences of both appellants are set aside.

_____

H Saldulker

Judge of Appeal

APPEARANCES:

For the Appellants:	P Shapiro
	Instructed by:
	S Shapiro Attorneys, Johannesburg
	Mpobole & Ismail, Bloemfontein
For the Respondents:	C Mnisi
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein