THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 852/2020

In the matter between:

NOXOLO VICTORIA NONGOGO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Nongogo v The State* (Case no 852/20) [2021] ZASCA 166 (03 December 2021)

Coram: SALDULKER ADP and MOCUMIE, MOKGOHLOA, NICHOLLS and GORVEN JJA

Heard: 12 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 09h45 on 03 December 2021.

Summary: Criminal law and procedure – conviction of murder and conspiracy to commit murder – whether the court a quo erred in convicting the appellant on both conspiracy to commit murder as well as

murder – special entry – whether an irregularity had been committed in ordering the trial to start de novo before another judge.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Mjali J, sitting as court of first instance):

1 The appeal succeeds to the extent that the conviction and sentence on conspiracy to commit murder is set aside.

2 Save for the aforegoing, the appeal is dismissed.

3 The conviction and sentence on the count of murder are confirmed.

JUDGMENT

Nicholls JA (Saldulker ADP and Mocumie, Mokgohloa and Gorven JJA concurring)

[1] The appellant, 44 years old at the time, was found guilty on two counts in the Eastern Cape Division of the High Court, Mthatha (per Mjali J) in 2013. The first was murder and the other conspiracy to murder her husband. For the purposes of sentencing both counts were taken together and she was sentenced to life imprisonment in terms of the minimum sentencing provisions embodied in s 51(1) of the Criminal Law Amendment Act 105 of 1997.

[2] The appellant applied for leave to appeal against conviction and sentence. Leave to this Court was granted by the high court on two aspects, namely 'on the strength of the special entry that was entered during the trial' and whether the conviction on both the counts of murder and conspiracy to commit murder amounted to a duplication of convictions.

[3] The State has conceded that the appellant should have been convicted of either murder or conspiracy to commit murder, but not both. This was explained in *S v Fraser*:[1]

'Normally, where a person conspires with another to commit a crime and the crime in question is committed, then the conspirator is liable for the crime itself and should be so charged: See Burchell *South African Criminal Law and Procedure* vol 1 General Principles of Criminal Law 3rd ed at 367 and cf *R v Milne and Erleigh (7)* 1951 (1) SA 791 (A) at 823G.'

This concession is well made and therefore the appeal on duplication of convictions must succeed.[2] All that remains for consideration is the special entry.

[4] Section 317 of the Criminal Procedure Act 51 of 1977 (the Act) provides that:

'(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a

[1] *S v Fraser* 2005 (1) SACR 455 (SCA) para 7.
[2] *S v Whitehead and Others* [2007] ZASCA 171; 2008 (1) SACR 431 (SCA) para 33.

special entry, be made unless the court to which or the judge to whom the application for special entry is made is of the opinion that the application is not made bona fide, or that it is frivolous or absurd or the granting of the application would be an abuse of the process of the court.'

[5] During the course of the trial the court a quo entered a special entry on the basis of the following facts. The appellant was initially charged together with one Temba Tsekemane (Mr Tsekemane) for the murder of her husband before Griffiths J in the high court. Both pleaded not guilty. After 12 state witnesses had been led, Mr Tsekemane changed his plea to one of guilty, which plea was accepted by the State. This prompted Griffiths J, at the instance of the State, to grant a separation of trials in terms of s 157 (2) of the Act. The trial of the appellant was ordered to commence *de novo*. Mr Tsekemane was found guilty of murder, and acquitted on conspiracy to murder. He was sentenced to 20 years' imprisonment.

[6] Pursuant to the order of Griffiths J, the trial of the appellant commenced before Mjali J. During the cross-examination of Mr Tsekemane it came to light that he had previously been charged together with the appellant for the same offences. Both parties were instructed to address the court on whether the fact that the appellant was being charged for the same offence but before a different judge amounted to an irregularity. The court a quo then made a ruling that a special entry be entered in the record.

[7] The wording of the special entry is lengthy but the crux of the special entry is the following:

(a) Whether it was permissible for Griffiths J to have ordered a separation of the trials of Mr Tsekemane and the appellant at such a late stage of the proceedings;

(b) whether it was irregular to have ordered that the trial of the appellant commence *de novo* before another judge when there was no order nullifying the trial before Griffiths J;

(c) whether Mr Tsekemane could be called as a state witness in the trial of the appellant in the court a quo;

(d) whether the appellant's fair trial rights had been violated by the unreasonable delay in finalising her matter; and

(e) whether the appellant had been tried twice for the same offence.

[8] After the special entry had been entered the trial proceeded before Mjali J who duly convicted the appellant of both murder and conspiracy to murder and sentenced her to life imprisonment.

[9] In order to determine whether any irregularity has occurred it is necessary to have regard to s 157 (2) of the Act which provides:

'(1). . .

(2) Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of the prosecutor or any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.'

[10] The main test in deciding whether to grant an application for separation is whether there will be prejudice to the accused. In *R v Zonele and Others*[3] the converse occurred in that a special entry had been entered because the trial judge had *not* ordered a separation of trials after one of

[3] *R v Zonele and Others* 1959 (3) SA 319 (A) at 325.

three co-accused had pleaded guilty. The trial judge had permitted the trial to proceed in respect of all the accused, including the accused who had changed his plea to one of guilty. He had also given a verdict simultaneously on all the accused. This was alleged to be irregular. Holmes AJA, found that once the one accused had pleaded guilty, his trial should have been separated from that of the other accused. Reference was made to s 155 of the previous Criminal Procedure Act 56 of 1955, which is substantially the same as s 157 of the present Act, and the learned judge stated that a separation of trials was the prudent and established practice where one of the accused changed his plea to one of guilty. However, this was not compulsory and the failure to separate did not per se result in the convictions being set aside. Emphasising that prejudice to the accused is the overarching consideration, the court held that on the facts of that matter, where there was overwhelming evidence against all of the accused, the conviction did not fall to be set aside.

[11] The general rule, therefore, is that once an accused changes their plea to one of guilty it is necessary to separate the trials, entertain the guilty plea, and order that the trial against the other accused start *de novo*.[4] The exception is where the interests of justice dictate otherwise.[5] In this matter it is self-evident that the failure to separate would have caused prejudice to the appellant. Both Mr Tsekemane and the appellant were represented by the same legal representative. Inevitably a conflict of interest would have arisen. To ensure a fair trial it was prudent to order that the trial commence before another judge. There was no irregularity committed by Griffiths J by ordering a separation of the trials and, in fact,

[4] A Kruger *Hiemstra Criminal Procedure* Chapter 22 (Online Edition, May 2021) at 22-36; *S v Somicza* 1990 (1) SA 361 (A) at 365 D-E.
[5] *R v Nzuza* 1952 (4) SA 376 (A) at 381 G; *R v Solomon* 1934 CPD 94 at 96.

the appellant may have had grounds for complaint had a separation not been granted.

[12] As regards to whether Mr Tsekemane could be called as a witness against the appellant, it is a long established principle that an accused person who has pleaded guilty can be called to give evidence against the other accused once the trials have been separated.[6] As far back as 1951 Schreiner JA held that when an accused charged with the same offence, changes his plea to one of guilty, he is a competent witness against the remaining accused in their trials. Further, the court held that it makes no difference whether the person who has pleaded guilty to the joint charge and been convicted, has been sentenced or not before being called as a state witness. This is open to some doubt but in any event it does not arise in this matter as Mr Tsekemane had already been sentenced before he testified against the appellant.

[13] The delay in finalising the matter should be seen against the backdrop of the chronology of events. In the first trial Mr Tsekemane was convicted pursuant to his changed plea on 16 November 2011 and sentenced accordingly on 18 November 2011. The trial of the appellant commenced on 20 February 2012. She was convicted on both counts on 11 July 2013 which were treated as one for the purposes of sentence. On 4 March 2014 the appellant applied for leave to appeal and on 15 May 2014 leave to appeal was granted to this court on the issue of the special entry and the duplication on conviction. It appears that the appellant did not prosecute the appeal for a period of more than five years until 15 September 2020 when the appellant submitted an application for condonation for the late filing of the notice of appeal and the appeal

[6] *Ex Parte v Minister of Justice: in re R v Domingo* 1951 (1) (A) 36 at 38 F-G.

record. On 30 April 2021 the appellant's heads of argument were filed with this Court. In these circumstances where the delay in the finalisation of the matter lies squarely at the door of the appellant, there is no basis for finding that the delay has violated her constitutional fair trial rights.

[14] The final issue raised in the special entry was whether the appellant had been charged twice with the same offence. Once charged with an offence an accused person is entitled in terms of s 106 of the Act to plead that he or she has already been convicted, or alternatively, acquitted of the offence. The appellant did not demand a verdict in terms of s 106 (4) of the Act[7] or plead *autrefois acquit* or *autrefois convicti*. Indeed, she was not entitled to, as s 157 (2) specifically states that the court may abstain from giving judgment. After a separation of trials the accused is tried afresh. The court a quo's concerns in this regard are unwarranted.

[15] The issues raised in the special entry have no merit. There was no irregularity committed by Griffiths J that vitiated the proceedings before the court a quo and the special entry should not have been entered into the record. The appeal in respect of the special entry must fail. The appeal on duplication of convictions succeeds and insofar as this may have an impact on the overall sentence, the court a quo found no substantial and compelling circumstances to depart from the prescribed minimum sentence for murder. This finding is unimpeachable and, for that reason, the sentence of life imprisonment is appropriate.

[16] In the result the following order is made:

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[7] Section 106 (4) provides that: 'An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted'.

1 The appeal succeeds to the extent that the conviction and sentence on conspiracy to commit murder is set aside.

2 Save for the aforegoing, the appeal is dismissed.

3 The conviction and sentence on the count of murder are confirmed.

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C NICHOLLS

JUDGE OF APPEAL

APPEARANCES:

For appellant:	L D Halam
Instructed by:	Mdledle-Malefane & Associates, Mthatha
	Webbers Attorneys, Bloemfontein
For respondent:	M L Makubalo
	Director of Public Prosecutions, Mthatha
	Director of Public Prosecutions, Bloemfontein