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

**JUDGMENT**

Case no: 369/11
**Reportable**

In the matter between:

**NTHABELENI DANIEL RATHUMBU** **Appellant**

and

**THE STATE** **Respondent**

**Neutral citation:** *Rathumbu v S* (369/11) [2012] ZASCA 51 (30 March 2012)

**Coram:** **MTHIYANE DP, CLOETE, MHLANTLA, LEACH JJA and NDITA AJA**

**Heard:** **15 February 2012**

**Delivered:** **30 March 2012**

**Summary:** Murder charge – admissibility and probative value of a statement made by a witness to the police and later disavowed in evidence – s 3(1) of the Law of Evidence Amendment Act 45 of 1988 - trial court correctly relied on the disavowed statement.

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**ORDER**

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**On appeal from:** Limpopo High Court, Thohoyandou (Hetisani J sitting as a court of first instance):

The appeal against conviction is dismissed.

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**JUDGMENT**

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**NDITA AJA (MTHIYANE DP, CLOETE, MHLANTLA, and LEACH JJA concurring)**

[1] The appellant was convicted of murdering his wife in their homestead at Rhavele village in the district of Tshilwavhusiki by the Limpopo High Court sitting in Thohoyandou (Hetisani J) and sentenced to ten years' imprisonment. With the leave of this court, he now appeals against the conviction.

[2] The conviction was based primarily on a written sworn statement made by the appellant's sister Ms Johanna Rathumbu to a policeman that implicated the appellant in the murder of the deceased. Central to this appeal is an enquiry into whether the statement, the contents of which were disavowed by her when she testified, should have been admitted in evidence.

[3] It is necessary to set out the facts in some detail. Shortly before midnight on 15 June 2008 Constable David Mulaudzi was on duty at the Tshilwavhusiku police station when Ms Rathumbu arrived, running. She reported that she found the appellant stabbing the deceased with a knife at their home. Acting on this information, Mulaudzi, Tshikudu as well as Ms Rathumbu, drove to the appellant's home where Mulaudzi found the body of the deceased lying on the other side of an internal door. She had sustained multiple stab wounds and was lying motionless in a pool of wet blood. The witness summoned paramedics who certified the deceased dead at the scene.

Prior to the arrival of the paramedics, the appellant also arrived and sought permission from Mulaudzi to board the police vehicle and be taken to the police station. According to Mulaudzi, the appellant smelt of alcohol. When the appellant made this request, Mulaudzi enquired from Ms Rathumbu who he was. Johanna told him that he was the person who had stabbed his wife in the room. This explanation was given in the presence of the appellant.

[4] Amongst the police officers who attended the murder scene on the night in question was Inspector Nndwambi. He testified that on his arrival at the appellant's home he asked for the owner of the house. Ms Rathumbu offered to help and led him to the room where the body of the deceased lay. Nndwambi testified that he made enquiries about the murder and Johanna disclosed to him that the appellant, who she identified as her brother, had stabbed the deceased, whom she identified as his wife. Nndwambi further testified that when he closely examined the body of the deceased, he observed that she had sustained multiple wounds, some of which were covered in blood; notably two on the chest and another on the back. According to the post mortem report, the deceased sustained nine external wounds.

[5] Ms Rathumbu testified that on 16 June 2008, at 21h00, she received a telephone call from the deceased requesting her to come to her house and to bring with her the deceased's five year old daughter. According to her, on her arrival at the deceased's home, she found her lying in a pool of blood. The gruesome discovery alarmed her and she ran to the police station. The police drove with her back to the village. She denied seeing the appellant stabbing the deceased with a knife. As her evidence was in stark contrast to the facts she had disclosed in her statement to the police, the State successfully applied to have her declared a hostile witness in terms of s 190(2) of the Criminal Procedure Act 51 of 1977. It is necessary to place on record the witness's statement in its entirety. The relevant part reads:

'On 2008-06-15 at about 21:00, I was at my common when I received a call from the deceased Khathutshelo Rathumbu that I must come to her place. I immediately went to the deceased's kraal. On my arrival I find the deceased who inform me that she is leaving her husband and further that I must help her to carry her goods.

I then ask the suspect one Daniel Rathumbu who is the deceased's husband if there is any problem. The suspect told me ask the deceased as she is the one who called. I was at the lapa when the deceased and the suspect enter inside the house.
I also enter inside and I saw the suspect pushing the deceased and stabbing her with a sharp instrument. I then run away to the neighbours for assistance but there was no responds. I then rushed to the police station and report the matter.

I come back with the police and find the deceased lying in the bedroom and in a pool of blood. At that moment the suspect come back and I ask him the whereabouts of the child, he told me that she is gone. The police then summoned the ambulance and she was certified dead. The police arrested the suspect.'

[6] Inspector Thifhulufheli Sirunwa testified that he took the above statement in the early hours of the morning, at 01h45, on 16 June 2008. Johanna made the statement voluntarily. According to Inspector Sirunwa he interviewed Ms Rathumbu in Tshivenda as they were both conversant in the language but wrote it in English. After writing it, he read it back to her and she appended her signature. Ms Rathumbu was extensively cross-examined on the contents of her statement which was admitted into evidence. She persistently denied its contents to the extent that it implicated the appellant in an attack upon the deceased. The appellant did not give evidence in rebuttal of the evidence tendered by the State.

[7] In convicting the appellant, the trial court made significant favourable credibility findings in respect of witnesses for the State and rejected Ms Rathumbu's evidence disavowing the statement she had made to Sirunwa. The statement was admitted in evidence after argument and the court a quo relied on its contents.

[8] Counsel representing the appellant assailed the conviction on several grounds. The main ground of appeal was that the trial court's reliance on the statement made by Ms Rathumbu to the police, which essentially is hearsay evidence, constituted a material misdirection. Counsel representing the State conceded that without the statement, the appeal should succeed.

[9] The reception of hearsay evidence is regulated by s 3(1) of the Law of Evidence Amendment Act 45 of 1988. The section provides as follows:

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence in criminal proceedings, unless -

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

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

*(c)* the court, having regard to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

For reasons that follow I am of the view that the statement was correctly admitted in terms of the section.

[10] Section 3 enjoins a court in determining whether it is in the interests of justice to admit hearsay evidence, to have regard to every factor that should be taken into account and, more specifically, to have regard to the factors mentioned in s 3(1)*(c)*. [1]This court in *S v Ndhlovu* 2002 (6) SA 305 (SCA) considered the provision of s 3 and at paragraph 31 held that:

'The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may bear on question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is

1 See *S v Shaik & others* 2007 (1) SA 240 (SCA) para 170. See also *S v Molimi* 2008 (3) SA 608 (CC).

whether the interests of justice require its admission.'

In amplification, at paragraph 33, it was stated that:

'The "probative" value' of the accused's statements to the police did not depend on their credibility at the time of the trial – which the Court right found totally lacking – but on their credibility at the time of their arrest. And the admissibility of those statements depended not on the happenstance of whether they chose to testify but on the interests of justice.'

[11] In the present appeal, following the approach set out in *Ndhlovu*, and considering the totality of the circumstances under which the statement was made, one is driven to the conclusion that the court below was correct in admitting Ms Rathumbu's statement. Substantial corroboration for the truthfulness of the statement is to be found in other evidence tendered by the State. I now deal with such corroborative evidence.

11.1 It is common cause that Ms Rathumbu proceeded to the appellant's home at approximately 21h00 on 16 June 2008. According to her evidence as well as her statement, her visit to the deceased's home was prompted by a telephone call from the deceased requesting her to bring her child to her. In the statement, she stated that in that telephonic conversation, the deceased told her that she was leaving her husband and she needed her assistance in carrying her goods. Mulaudzi testified that he observed that outside the house, about three paces from the kitchen door, there was clothing packed inside a box 'like one is moving somewhere else.' This provides corroboration for Ms Rathumbu's assertion in her statement that the deceased told her that she was leaving her husband and that she needed help in carrying her goods. Importantly, a photograph taken by the police depicts a pile of items outside the house, which lends further credence and weight to the statement.

11.2 Mulaudzi testified that when he enquired from Ms Rathumbu as to the identity of the person who wanted to be taken to the police station, her response was that he was the person who had stabbed his wife in the room. This accords with what, according Mulaudzi, she had said at the police station earlier. This spontaneous response by Ms Rathumbu at

the scene whilst the deceased's body was still lying in the house affirms the reliability of the original statement in preference to her later disavowal. Furthermore, these words were uttered in the presence of the appellant. The utterances did not attract any protestation from the appellant. Nor was the evidence challenged in cross-examination.

11.3 Ms Rathumbu confirmed in her evidence that she had made a statement to Inspector Sirunwa. But she said that the contents had been read back to her in English (which Sirunwa denied). She also averred that she knew nothing about of the contents of the statement that implicate the appellant. That means, according to her, parts of the statement are a complete fabrication. But the contents of the statement accord with what she had told Inspector Tshivhase in the presence of Constable Mulaudzi when she arrived at the police station. Shortly thereafter she repeated the same version to Nndwambi. It is highly improbable that three policemen, two of whom arrived at different intervals at the murder scene, would conjure up all the details contained in the statement on the same night of the murder of the deceased. Similarly, it is not likely that Inspector Sirunwa could have concocted the information contained in the statement before leaving the scene of the murder.

[12] Applying the principles set out in the *Ndhlovu* case, all of the above factors clearly demonstrate that when she made the statement Ms Rathumbu was telling the truth. Her inconsistent evidence at the trial can be easily explained on the basis that she wished to protect her brother. Her statement therefore, was correctly admitted into evidence.

[13] Ms Rathumbu's statement is not the only evidence to be considered in determining the appellant's guilt. The conduct of the appellant is also relevant. Mulaudzi gave evidence to the effect that whilst the police were awaiting the arrival of the paramedics, the appellant appeared. After entering the yard and without saying anything to the police officers or people at the scene, he climbed into what seemed to the witness to be a disused motor vehicle. I have already said that the appellant did not give evidence. Neither did he deny Ms Rathumbu's assertion at the scene that he had stabbed the deceased. The

appellant did not enquire as to the reason for the presence of the police in his own home or why members of the community were present. He made no attempt to ascertain what the problem was and the inference is irresistible that he already knew why all these people were there

[14] The court below considered the State witnesses to be credible and rejected the appellant's defence. In the present appeal, once Ms Rathumbu's statement was admitted, and in the face of all the evidence tendered by the State, it called for an answer from the appellant. Thus, the court a quo correctly considered the evidence tendered by the State to be such as to warrant a response from the appellant. In *S v Mapande*[2] it was reiterated that if a witness has given evidence implicating an accused, the latter can seldom afford to leave such testimony unanswered. The court is unlikely to reject credible evidence which the accused has chosen not to deny. Thus in *S v Chabalala*[3] it was stated that:

'The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. If he was innocent appellant must have ascertained his own whereabouts and activities on 29 May and be able for his non-participation. . . To have remained silent in the face of the evidence was damning. He thereby left the *prima facie* case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.'

[15] In my view, the appellant's culpability for the murder of the deceased was established beyond any reasonable doubt. In the circumstances, the appeal against conviction must fail.

[16] In the circumstances, the following order is made:

The appeal against conviction is dismissed.

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2 [2010] ZASCA 119.

3 2003 (1) SACR 134 (SCA) para 21 See also *S v Boesak* 2001 (1) SACR 912 (CC) para 24.

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**T NDITA**

**ACTING JUDGE OF APPEAL**

APPEARANCES:

FOR APPELLANT: L B Sigogo

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| Instructed by: | Mathobo, Rambau & Sigogo Attorneys,<br>Thohoyandou. |
| FOR RESPONDENT: | R J Makhera |
| Instructed by: | Director of Public Prosecutions, Thohoyandou;<br>Director of Public Prosecutions, Bloemfontein. |