IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: CC25/2009

DATE: 3 MAY 2010

In the matter between:

THE STATE

and

1. **NELISWA NESTI GQALANE**
2. **MZUKISI TWALAMATYE**
3 **SIYABONGA BALENI**

J U D G M E N T

KLOPPER, AJ:

As the record indicates, the State has indicated that they wish to invoke the provisions of section 3 of Act of 1988 in respect of the admission of hearsay evidence and I will at this stage then give a ruling on that application.

INTRODUCTION:

At this stage of the proceedings, the State has presented

evidence by the investigating officer of a statement made by accused 1 subsequent to her arrest on 25 May 2007. The circumstances in which the statement was made and the contents of that statement which contains certain admissions by accused 1, are contained in Exhibit H. I am not going to repeat the contents of that statement. Suffice it to say that the statement made by accused 1 directly implicates accused 2 and 3 in the commission of the crime.

Counsel for accused 1 did not object to the admissibility of the statement, either on the basis of hearsay or in terms of the provisions of section 219(a) of Act 51 of 1977, or for that matter on any constitutional principle. Counsel for the State, however, informed the Court that the State wishes to invoke the provisions of section 3 of Act 45 of 1988 and requests that the hearsay evidence is admitted as evidence against accused 2 and 3.

The common-law relating to hearsay evidence is no longer applicable and has been replaced by the codification of these principles in section 3 *supra*. Section 3 sets out clear rules in regard to the admission of hearsay evidence. It reads:

"3(1) *Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at*

criminal or civil proceedings, unless:

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

(b) the person upon whose credibility the probative value of such evidence depends, himself (or one can read herself in there as well), 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."

It is necessary to determine whether the evidence which forms the subject of this particular decision, is indeed hearsay evidence. In the past there has been some confusion as to whether a statement made by a party to the proceedings, is indeed hearsay evidence. The Act in section 4 clearly defines hearsay evidence and reads as follows:

> *"For the purposes of this section, hearsay evidence means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."*

Based on this definition, I have no doubt that the statement made by accused 1 in these circumstances, is in fact hearsay evidence as per the definition. I must, therefore, determine whether the evidence is to be admitted in terms of section 3. This decision involves a question of law.

SECTION 3(1)(a):

In respect of accused 2 and 3, counsel for accused 2 and 3 have clearly not agreed to the admission of the evidence, although the grounds upon which they object differ in some

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respects. Ms Seshea for accused 3 has, for instance specifically referred to the weight which the Court should attach to such evidence. It is important to distinguish between the admissibility of the evidence on the one hand and its probative value on the other hand. Section 3 is primarily dealing with questions of admissibility, although the probative value is also a factor and specifically included in section 3(1)(c)(iv). From what I have already indicated, the provisions of section 3(1)(a) are not applicable to accused 2 and 3.

SECTION 3(1)(b):

If I understood the arguments of Ms Booysen, counsel for the State, correctly, her argument is that it is probable in the light of the circumstances of this case, that accused 1, who is in effect "the person upon whose credibility the probative value of the evidence depends", will testify during the proceedings in her own defence. If she does, it is argued then any prejudice to accused 2 and 3, by the admission of this evidence, will fall away. Mr Thompson for accused 1, correctly so in my opinion, has indicated that there is no guarantee, in the light of the evidence presented by the State, that accused 1 will testify.

The election to testify in a criminal case, is dependent upon a decision to do so by the accused herself. It is not a situation where, because of the absence of a potential witness, the

Court has been informed that the witness will testify at a later stage and the Court is requested to provisionally receive the evidence in terms of section 3(3). The situation here is that the potential witness is in fact present and a party to the proceedings and she cannot be compelled to testify at a later stage in these proceedings. See *S v Molimi & Another* 2006(2) SACR 8 (SCA) 27.

This is not, in my view, an instance where the provisions of section 3(1)(b) are applicable, which lends itself to the provisional admittance of the evidence based on the remote possibility that an accused may elect to testify at a later stage. Section 3(3), as far as this is concerned, reads as follows:

> *"Hearsay evidence may be provisionally admitted in terms of subsection (1)(b), if the Court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings."*

SECTION 3(1)(c):

What remains is for this Court to decide whether such evidence should be admitted in the interests of justice. Now applying the facts and circumstances to the seven factors indicated in section 3(1)(c), is not an easy task. The interest

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of justice in a broader sense, could entail circumstances where hearsay evidence implicating an accused is excluded, which could result in an acquittal. On the other hand the admission of such evidence in certain circumstances, could be so prejudicial that it could lead to an injustice and to a failure to afford the accused a fair trial. It is, therefore, for good reason that the courts, particularly in criminal matters, show some reluctance to invoke the provisions of the section and to admit such evidence on this basis.

What is clear in this case, without dealing at this stage in detail with the merits, is that based on the evidence presented by the State up to date, and given the problems experienced in presenting that evidence, the hearsay evidence sought to be admitted, without a doubt, plays a decisive and significant role in the State's case. See *S v Ramavhale* 1996(1) SACR 639 (A). In considering the relevant factors, I have attempted to give effect to their weight as determined holistically. Many of the factors are also interlinked:

(i) THE NATURE OF THE PROCEEDINGS:

This is a criminal trial in which all three the accused are arraigned on a charge of murder and robbery with aggravating circumstances. The evidence to date presented by the State, applicable to a particular

accused, is mainly circumstantial and not without criticism. An important witness called by the State was discredited because she failed to adhere to a previous statement and that witness in question, has subsequently decided not to attend further proceedings. The Court has been informed that she could not be traced to date. Her evidence, including cross-examination, has not been concluded. It is understandable in these circumstances that the State is desirous to have the evidence in question admitted. At the same time it must be recognised that despite the proceedings being of a criminal nature, it will be the interests of justice that ultimately dictates whether such evidence should be admitted or not. See *S v Shaik & Others* 2007(1) SA 240 (SCA).

(ii) THE NATURE OF EVIDENCE:

The nature of the evidence on the face of the statement made by accused 1 is not difficult to establish. It is a statement which in essence does not admit to any wrongdoing on the part of accused 1 herself. In fact what it does is to distance her from the commission of the crimes and render her to the status of an observer rather than a perpetrator or an accomplice. The peculiar situation is that if the statement was a confession by

accused 1, it would, by virtue of the provisions of section 219 of the Criminal Procedure Act, not be admissible as evidence against accused 2 and 3. There is perhaps much to be said for the argument that there should, in effect, not be any distinction made between the approach to be adopted in respect of a confession and the approach in respect of admissions in terms of hearsay provisions.

There can be no doubt that there are significant dangers and, therefore, also real prejudice to accused 2 and 3 in admitting such evidence. In *S v Molimi* 2008(2) SACR 76 (CC) at 94, these dangers are recognised and highlighted by the Constitutional Court. It is improbable, given the nature of the evidence in this case, that accused 2 and 3 will be afforded the opportunity to test the credibility and reliability of the statement made by accused 1. This statement, in effect, directly implicates accused 2 and 3 in the commission of the crimes.

In considering the dangers inherent in the evidence, the fact that accused 1 made this statement after her arrest, and it is averred that she was part and parcel of a premeditated murder, are factors that cannot be ignored. The nature of the statement is that accused 1 in fact is

attempting to proclaim her innocence and at the same time pointing fingers at accused 2 and 3. In circumstances where this evidence was presented by the State and accused 1 was a State witness, or even a witness in terms of section 204 of the Criminal Procedure Act, such evidence would be subjected to a thorough cross-examination by the parties disputing it.

The Court would have had the benefit of observing her as a witness, and the evidence would, by its nature, be considered with caution. There is nothing to eliminate or reduce the dangers in a situation where accused 1 does not have to testify during the proceedings. I have already made mention, *supra*, of the reasons why the State has decided to rely on this evidence.

(iii) <u>THE PURPOSE FOR WHICH THE EVIDENCE IS TENDERED</u>:

It is clear from the counsel for the State's arguments, that the evidence is sought to be admitted in order to prove part of the truth of the contents and to directly implicate accused 2 and 3. It was also mentioned that the evidence is being utilised in order to prevent the accused from obtaining a discharge in terms of section 174 of the Criminal Procedure Act, should they elect to

apply for such discharge at the close of the State's case. Schultz, JA in *S v Ramavhale supra* at 649 said:

> *"The Court should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused unless there are compelling justifications for doing so."*

Although the statement of an accused was admitted in *S v Ndhlovu & Others* 2002(2) SACR 325 (SCA), the circumstances in which the statement was made, and its nature, differs, in my view, from the facts of this case. Addressing the question concerning the possibility of a motive to implicate the accused, Cameron, JA remarks as follows at 346c:

> *"Did accused 3 and 4 have a motive unjustly to implicate accused 1 and 2? Where the declarant is himself suspected of participation, a motive to implicate another falsely, may be present if hearsay emanates from a self-exculpatory statement. That is not the position here. The declarants were under suspicion, but they confirmed that suspicion without ado by implicating themselves."*

In my view the same argument cannot be made in respect of the position of accused 1 in this matter.

THE PROBATIVE VALUE OF THE EVIDENCE:

As previously indicated, the State's reliance on this evidence is based on the fact that most of the evidence presented to date, is of little or no value at all. Except for a similar statement made by accused 1 during a pointing out process and a reference to the sale of a cell phone after the incident, there is very little evidence against accused 2 and 3. In *Ndlovu & Others supra*, the higher probative value of the hearsay evidence, emanated from the powerful way in which all the evidence in that case interlinked and completed the mosaic of the State's case.

So too in other decisions, the probative value lay in the manner in which the hearsay evidence reinforced the other evidence and was confirmed by other reliable evidence. See *Skilwa Property Investments (Pty) Ltd v Lloyds of London* 2002(3) SA 765 (T) and *S v Molimi & Another* 2006(2) SACR 8 (SCA) at 17.

(iv) THE REASON WHY THE EVIDENCE IS NOT GIVEN BY THE PERSON UPON WHOSE CREDIBILITY THE PROBATIVE VALUE OF SUCH EVIDENCEDEPENDS.

The reason is obvious. The statement is made by accused 1, who cannot be compelled at this stage to testify and who has a choice whether to testify later.

(v) ANY PREJUDICE TO A PARTY WHICH THE ADMISSION OF SUCH EVIDENCE MIGHT ENTAIL.

In dealing with the other relevant factors, I have already touched upon many of the aspects which may cause real or potential prejudice to accused 2 and 3. As far as the procedural prejudice is concerned, I am of the view that this has been averted by the indication by counsel for the State, that the State wishes to invoke the provisions of section 3 before the State has closed its case. Counsel for accused 2 and 3 have had the opportunity to object to the admission of the evidence and argument in this regard has been tendered. The accused are aware of the possibility that the evidence may be admitted and will have had time to prepare to counter any effect that such admission may have, if this is at all possible.

In short, reference to section 3 was not made at a late stage, as was the case in many of the decided matters

and a decision is being made before the closing of the State's case. The prejudice to accused 2 and 3 lies in the fact that there is very little other evidence implicating them and there are very few alternative options available to reduce the inherent dangers of admitting such evidence. Accepted techniques to do so, will be unavailable. The acceptance of this statement depends entirely on the credibility of accused 1. It is doubtful, at this stage, whether accused 1 will testify and be subjected to any form of scrutiny. Aspects mentioned in the statement will not be capable of being placed in context, or for that matter be clarified or even amplified.

Accused 2 and 3 will be denied the right to challenge the evidence in cross-examination and expose dishonesty or error, or even to extract aspects favourable to themselves and to confront accused 1 with their version of events. Cross-examination is a fundamental and crucial characteristic of the adversarial system which applies to our criminal law. Inasmuch as section 3(1)(c) constitutes a limitation to the right to challenge evidence, as envisaged in the Constitution and it may be argued that it neither violates the accused's right to challenge evidence, (see *S v Ndlovu & Others supra*), nor is a justifiable limitation to that right, I hold the view that

based on the circumstances in this case, there are strong indications that admission of the evidence against accused 2 and 3 will impact on their right to a fair trial and is not justifiable in the circumstances.

(vi) ANY OTHER FACTOR WHICH SHOULD, IN THE OPINION OF THE COURT, BE TAKEN INTO ACCOUNT:

I have made mention of the reasons why the State, in the circumstances has decided to invoke the provisions of section 3. I have indicated the circumstances of the witness called by the State, who has been discredited and has not made an appearance. In deciding whether to admit this evidence in the interests of justice, it is perhaps important to note and to ask the question as to why the State did not, in the absence of other evidence, decide to utilise accused 1 as a State witness in this matter.

The logical answer, I think, emanates from the facts before this Court, which include the fact that the State avers in its indictment and statement of facts, that accused 1 is not only involved in the crimes, but that it was a premeditated crime.

This is what the State set out to prove and this indicates

that the State does not agree with the statement made by accused, indicating that she was in no way directly involved. The reliability of accused 1 in giving this version is, therefore, in essence placed in doubt from the very outset of the proceedings and it means that the State would not have considered her to be an open and honest witness, based on her statement made to the police.

This, I believe, plays a role in a situation where what the State is in fact doing is requesting that evidence against accused 2 and 3 be admitted based on the hearsay of a person, who is a co-accused, and whose credibility and reliability is already open to some doubt. This based on the allegations made by the State.

CONCLUSION:

After considering all the relevant factors, I find that the statement of accused 1 as evidence against accused 2 and 3 in terms of the provisions of section 3(1)(c) of the relevant Act, should not be admitted in the interest of justice.

KLOPPER, AJ

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