THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 18 February 2022

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Mawanda Makhala & Another v The State (438/2020) [2021] ZASCA 19 (18 February 2022)

Today the Supreme Court of Appeal (SCA) dismissed an appeal from the Western Cape Division of the High Court, Cape Town (high court).

The first and second appellants were convicted by Henney J in the high court on one count of murder, one count of possession of an unlicenced firearm and one count of unlawful possession of ammunition. The appellants were each sentenced to life imprisonment for murder and five years' imprisonment on the remaining counts.

On 23 July 2018, Mr Molosi was attending a school governing body meeting at Concordia High School as chairman after which he was shot and killed on his

way home. Upon investigation, the brother of one of the appellants, one Luzuko Makhala (Luzuko) indicated that he wished to recount his part in the murder and be treated as a witness under section 204 of the Criminal Procedure Act 51 of 1977. This section allows a witness to provide evidence for the prosecution which incriminates a witness. If the testimony is frank and honest, the witness may be discharged from prosecution.

Accordingly, Luzuko provided the police with two separate statements incriminating the appellants in the murder of Mr Molosi. The high court admitted the statements into evidence and convicted the appellants. However, when Lukuzo was called upon to give evidence, he recanted the contents of his statements. He testified that the incriminating portions of the statements were, in fact, fabrications forced upon him by the police. In light hereof, the appeal is grounded on the question whether the trial court was correct in convicting the appellants in light of the recanted statements.

This Court considered the statements made in light of the principle of legality and found that they were not obtained in violation of Luzuko's rights as there was nothing done to obtain the statements which would have constituted any material detriment to the administration of justice. Luzuko tried to rely on other defences, namely that the statements were hearsay, that he was denied his right to legal representation and that the high court failed to properly apply the cautionary rule applicable to evidence. Lastly, Luzuko sought to indicate, notwithstanding the aforementioned defences, that there was insufficient corroborative evidence to convict the appellants. This Court found each defence lacking and each failed.

In the result, this Court found the statements made by Luzuko were not unlawfully obtained and were correctly submitted into evidence. The high court judge correctly found that there was sufficient evidence to corroborate the statements; the State had discharged its burden of proof. Accordingly, the appeal was dismissed.

In a separate concurring judgment, the Court agreed with the reasoning and conclusions reached by the majority save for the conclusion that s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 found no application to the admissin of extra-curial statements made by a s 204 state witness. The Law of Evidence Amendment Act allowed for a more flexible discretionary approach to the admissibility of hearsay evidence than what the common law provided for. In deciding whether hearsay should be admitted in the interests of justice, the court was not limited to the factors listed in s (3)(1)*(c)*(i) to (vi) but empowered in terms of s 3(1)*(c)*(vii) to have regard to 'any other factor which should in the opinion of the court be taken into account'. In deciding whether hearsay should have been admitted in the interests of justice in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act, the court was at liberty to seek guidance from the jurisprudence of other jurisdictions, and in a given case could also have taken into account factors that would have been taken into account in such other jurisdictions.

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