REPUBLIC OF SOUTH AFRICA
THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
APPEAL JUDGEMENT

REPORTABLE

Case No: AR 294/10

In the matter between:

EDMUND MATHONSI **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: Mathonsi v S (AR 294/10 [2011] ZAKZP (JULY 2011)

Coram : MADONDO J

Heard : 4 January 2011

Delivered : 26 July 2011

Summary: Evidence ─ Probative value of the previous inconsistent statement by a hostile or unfavourable witness and the value to be attached thereupon─ The court is entitled to make substantive use of the previous statement by hostile witness and to give the statement, as evidence, the appropriate weight provided sufficient guarantees of reliability are present. Making the statement under oath, solemn affirmation or solemn declaration and the cross-examination of the declarant by both the state and defence at the trial respecting the statement, constitute guarantees of reliability. The statement may also be utilized for substantive purposes as an exception to hearsay rule. The basic principle─ A conspectus of all evidence is required.

ORDER

Appeal against conviction is dismissed.

APPEAL JUDGMENT

MADONDO J

[1] The appellant, Edmund Mathonsi, was in the Regional Court sitting at Richards Bay convicted of murder and sentenced to twenty (20) years' imprisonment. With the leave of this Court he now appeals against conviction only.

[2] The appellant's contention is that had the learned regional magistrate not taken into account the previous inconsistent statement made by a hostile witness, there would have been no evidence against the appellant. It has, accordingly, been argued on his behalf that the state failed to discharge the onus rested on it to prove the guilt of the appellant beyond reasonable doubt.

[3] To the contrary, it has been argued on behalf of the state that the statement in question had sufficient evidential value to such an extent that the learned regional magistrate, when evaluating, assessing and considering all the evidence tendered before him in its totality, was entitled to take it into account.

[4] The facts and the evidence giving rise to this appeal are briefly the following: On 10 June 2007 at 00h30 Njabulo Gumede, the deceased, and Sandile Thamsanqa Banda (Banda) were at Madunga Bar purchasing beers. When they exited the bar two male

persons followed them on to the road. On the road there was a female person walking in front of them. Whilst they were walking along the road a voice came from behind ordering them to stop, but the deceased responded saying that he would not stop. Shortly thereafter, two gunshots were fired behind them. In consequence thereof, Banda ran behind the bar to his home. On his arrival at home, he reported the shooting incident to his mother. When he indicated to his mother that he wanted to go back in order to ascertain what had happened, his mother objected to that saying that it was then late at night and not safe.

[5] The female person who had been walking ahead of the deceased and Banda, when the two gunshots were fired was Zandile Hlatshwayo and she testified that after hearing the gunshots being fired behind her she became scared to proceed with her journey. She then returned to the bar and entered the bar premises through the small gate. At the time when she left the bar premises, prior to the shooting incident, she saw the appellant and Mandlenkosi Ephraim Nxumalo, his erstwhile co-accused, standing on the veranda of the bar. On her return to the bar she found the appellant and his erstwhile co-accused still standing on the same spot where they had been on her departure from the premises. On the following day at 07h00 the appellant telephoned her and told her that a dead body had been found lying outside the bar.

[6] Banda had not seen who the two male persons were that followed him and the deceased from the bar on the previous night. At 05h30 on the following day Banda returned to the scene of the shooting in order to ascertain what had happened. On his arrival there, he found the body of the deceased lying in the neighbourhood of the bar. Whilst Banda was on the scene Mrs Sharon Milda Mdletshe, (Mdletshe) a member of CPF – a community policing forum, arrived and summoned the police.

[7] According to Mdletshe at 07h15 she was on her way to open her tuck shop and when she walked past Madunga Bar, she saw a group of people standing on the dirt road. She proceeded to the scene and she found the dead body of a man lying on the dirt road. Amongst the people who had converged there was the appellant. On enquiring from him

what had happened, the appellant said that he had no knowledge. At the time the appellant was carrying a spent cartridge in his hand, wrapped in a plastic. Whilst they were talking (Mdletshe and the appellant) the appellant handed the spent cartridge over to Mdletshe. She later handed it over to the police on their arrival on the scene. This finds corroboration in the evidence of Constable Sabelo and of the investigating officer, Thokozani Clement Mkabela, who attended the scene of crime.

[8] According to the investigating officer, Mkabela, he also picked up a 9mm spent cartridge from the ground and received the other one from Mdletshe which she said she had received from the appellant. Following an information he had received on the 16 June 2007 Mkabela took appellant, his erstwhile co-accused and Muntu Nkosi Cele to Richards Bay Police Station for investigation purposes.

[9] On Monday, 18 June 2007 Cele stated that he was not involved in the commission of murder but the appellant and his erstwhile accused gave him two 9mm pistols for safe keeping. In fact they had requested him to conceal the said firearms. Cele then took Mkabela and other members of the police service to the garden of his home where he dug out three firearms. On arrival at his homestead, the police and Cele found Cele's aunt, Beauty Cele, present at home. The police then explained to her the purpose of their visit to the homestead and invited her to be present when Cele was digging up the firearms from the garden. Three firearms were recovered, i.e. two 9mm pistols and 7,65mm pistols, wrapped in a plastic bag in the garden. The police confiscated the three firearms. Mkabela then requested Constable Ndawonde to obtain a statement from Cele, with regard to the firearms found in his possession.

[10] The firearms confiscated from Cele and two spent cartridges, i.e., the spent cartridge received from the appellant and a spent cartridge Mkabela lifted from the scene together with two 9mm pistols were sent to Amanzimtoti Ballistic for examination and comparison. On examination a link between the firearms found in possession of Cele and the spent cartridges was established in that the cartridges were found to have been fired from the two 9mm pistols.

[11] On 18 June 2007 the erstwhile co-accused made a pointing out statement to Superintendent Mthimkhulu of Richards Bay Police Station. He took Mthimkhulu to the spot where the deceased was shot dead. He, the erstwhile co-accused, stated that he and the appellant each fired a single shot.

[12] The erstwhile co-accused also stated that there were boys that were fighting at the bar and one of them possessed a knife. The appellant dispossessed him of the knife. Later, the boy returned to the appellant and told him that he was then leaving. The appellant gave him the knife and he went away. However, the boy later returned to report to the appellant and his erstwhile co- accused that there were people who wanted to stab him outside. The appellant and the erstwhile co-accused went outside to investigate. The boys ran away in different directions. The appellant then drew his 9mm pistol and fired a shot at the deceased and he, the deceased fell down. The erstwhile co-accused also drew his 9mm pistol and fired a shot in the air. On the following day he returned to the scene. He was arrested on 16 June 2007. However, when he testified at the trial the erstwhile accused denied making a pointing out and stated that the statement was a product of coercion. He denied any involvement in the commission of the crime of murder.

[13] Cele, who was employed as a general worker at the bar, testified that between 23h00 and 24h00 on 10 June 2007 he was on duty. The appellant was in charge of the bar on the day in question. A girl came in and reported to the appellant that some boys were fighting outside and that some of them were carrying knives. The appellant went outside to investigate. On his return, the appellant was carrying a knife which he claimed to have dispossessed one of the fighting boys. At 24h00 Cele and his girlfriend left the bar premises for his home. On the following day he reported for duty. The appellant and his erstwhile co-accused told him that a dead body of a male person had been found lying in the neighbourhood of the bar premises.

[14] On Saturday, Cele, the appellant and the erstwhile accused were taken by the police for investigation. On Monday, 18 June 2007, the police took Cele to his homestead

to dig out the firearms which were buried in the garden of his premises. He told the police that the firearms belonged to his deceased brother. All what Cele said in the statement, he was told by the police to say. Seeing that the witness was deviating from the statement he had made to the police, the prosecution asked the statement to be proved and the witness to be declared hostile. The court then declared the witness hostile and he was then subjected to a full and effective cross-examination on the statement by both the prosecution and the defence.

[15] The essence of his statement was that after half an hour the boy, whom the appellant had dispossessed of the knife, came to report that the boys he had been fighting with had come back. The appellant and his erstwhile co-accused went out to investigate and on their return, they reported to the witness that someone had been injured outside. They claimed to have both shot the said person. Both the appellant and his erstwhile co-accused each gave the witness a 9mm pistol to hide so that the police would not find them in their possession. When the witness enquired from the appellant and his erstwhile co-accused as to where the person was shot, they pointed in the direction of the area where the dead body of the deceased was later found lying. The witness took the guns to his homestead where he buried them in the garden of his home.

[16] On Monday, 18 June 2007, during an interview by the police the witness decided to take the police to his homestead and to give them the firearms. Three firearms were recovered from his garden, i.e. two 9mm pistols and a 7.65mm. However, when he testified Cele claimed that the statement had been made by the police and drummed it into him. He went on to say that he made the statement for fear of being assaulted and tubed by the police. The witness in fact claimed that the statement was not his but the product of the police.

[17] Whereas Constable Ndawonde who obtained the statement from the witness testified that he took down the statement in English. On completing the statement Ndawonde read back and interpreted it to Cele who, in turn, said that he understood and confirmed the correctness of the contents thereof. Whatever the witness Cele said was

within his personal knowledge. He made the statement freely and voluntarily and signed it. Ndawonde then commissioned the statement.

[18] The erstwhile co-accused testified in his favour and denied any involvement in the commission of murder. He closed his case without calling further evidence. However, the appellant elected not to testify in his favour and closed his case.

[19] As part of the evidence tendered before court the learned magistrate when evaluating and considering the totality of the evidence before him he took the statement made by Cele, who had been declared hostile witness, into account. However, it is not apparent in his judgment as to what weight he attached thereupon. What is more apparent from his judgment is that in his reasoning by inference the magistrate laid much emphasis on the evidence of the witness, Zandile Hlatshwayo, that she had seen the appellant and his erstwhile co-accused on the veranda when she left the bar premises and that even on her return to the bar premises, after hearing the gunshots being fired behind her, she found them still standing on the same spot and that the firearms found in possession of Cele were ballistically linked to the spent cartridges lifted from the scene of crime to conclude that the appellant and his erstwhile co-accused were responsible for the death of the deceased.

[20] The question arises is whether the previous inconsistent statement by a hostile witness has any probative value worth consideration during the evaluation and assessment of all the evidence adduced before the court *a quo*, and if the answer is in the affirmative, what weight is to be attached thereupon.

[21] Before deciding whether the guilt of the appellant had been proved beyond reasonable doubt, this Court is enjoined to first decide the question whether the aforesaid previous inconsistent statement by a hostile witness had any probative value and what value, if any, had to be attached hereupon.

[22] In the present case the witness had been declared hostile because he had been

giving evidence adverse to the state and inconsistent with the statement he had made to the police. It is, therefore, not in dispute that a foundation necessary for declaring a witness hostile was properly laid. See *Meyer's Trustee v Malan 1911 TPD 559 at 56; Harvey v Thomas (1907) 24SC 463.* It is only the probative value of the previous inconsistent in the statement is in issue.

[23] At common law the previous inconsistent statement is only admissible to discredit the witness, but not as the evidence of the facts stated therein. See *Hoskisson v Rex 1906 TS 502 at 504; R v Deale and others 1929 TPD 259 and R v Beukman 1950(4) SA 261(O).*

[24] It is a principle of Criminal Law in Canada of long standing which was recognised in *Deacon v The King [1947] SCR 531* that prior inconsistent statement of a witness may only be used in assessing the credibility of a witness and may not be used as evidence of the truth of the matter stated therein.

[25] In the United States of America there is no uniformity on the admissibility of the previous inconsistent statements. Some States use the statement merely to show that the witness made the statement without tendering its contents as evidence. Whereas others admit the contents of the statement as an exception to the hearsay rule. See *Federal Rules of Evidence (LII 2010ed.)*, governing the admissibility of previous inconsistent statements.

[26] Under common law in Australia the evidence of a previous inconsistent statement of either an unfavourable witness or a hostile witness could not be admitted to prove the truth of its contents. However, with the promulgation of the Evidence Act, No. 2 of 1995, as amended, the common law position has changed. Now in terms of section 60 of the said Act the statement is admitted to prove the truth of the statement made. Where a witness does not acknowledge the statement as true its contents are proved by the person who took down the statement, the provisions of section 60 operate to make the representations contained in the statement to become evidence of the truth of the facts

asserted therein.

[27] In the United Kingdom, in R v Goodway [1993] 4 ALL ER 894 at 899, the Court held that there is no absolute rule excluding the evidence of the hostile witness because of its inconsistencies. At common law the previous statement by the hostile witness was only admissible to assess the credibility. However, in terms of sections 119 and 120 of the Criminal Justice Act 2003 the previous statement by the hostile witness is admissible as evidence of the facts contained therein. It does not only damage the credibility of the witness but it may also be tendered to rebut the alleged lie. Since the Act does not enumerate the conditions for admissibility of a previous statement, the common law test is still applicable.

[28] The Canadian Supreme Court in R.V.B (K.G) [1993] 1 S.C.R 740 on the prior inconsistent statement held that if it could be found to be both necessary and reliable, it could be admitted as an exception to the hearsay rule. The court held that a prior inconsistent statement should be admitted for all purposes if upon *voir dire* the trial judge is satisfied beyond reasonable doubt that the following conditions are fulfilled: Firstly, the evidence contained in the prior statement is such that it would be admissible if given in court; Secondly, the statement has been made voluntarily by the witness and is not the result of any undue pressure, threats or inducements; Thirdly, the statement was made in circumstances, which viewed objectively would bring home to the witness the importance of telling the truth; Fourthly, the statement is reliable in that it has been fully and accurately transcribed or recorded. Fifthly, that the statement was made in the circumstances that the witness would be liable to criminal prosecution for giving deliberately false statement.

[29] The following was also held to be sufficient circumstantial guarantees of reliability for the use of the prior inconsistent statement for substantive purposes: The statement was made under oath, solemn affirmation or solemn declaration following an explicit warning to the witness as to the existence of severe criminal sanctions for the making of a false statement, the statement was videotaped in its entirety; and the

opposing party, whether the Crown or the defence, had a full opportunity to cross-examine the witness at the trial respecting the statement.

[30] The facts in R v B case, where the Crown asked the court to reconsider the common law rule which limits the use of prior inconsistent statements to impeaching the credibility of the witness, were briefly as follows: The accused and three of his friends had been involved in a fight with two men. In the course of the fight, one of the youths, pulled a knife and stabbed one of the men in the chest and killed him. The four youths immediately fled the scene. Two weeks later, the accused's friends were interviewed separately by the police and with their consent the interviews were videotaped. In their statements they told the police that the accused had made statements to them in which he acknowledged that he thought he had caused the death of the victim by the use of a knife. The accused was charged with second degree murder and tried in Youth Court. At trial, the three youths recanted their earlier statements and, during the Crown's cross-examination pursuant to section 9 of the Canada Evidence Act, they stated that they had lied to the police in order to exculpate themselves from possible involvement. Although the trial judge had no doubt that the recantations were false, the witness's prior inconsistent statements could not be tendered as proof that the accused actually made admissions.

[31] Under traditional common law position, they could only be used to impeach the witness's credibility. In the absence of other sufficient identification evidence, the trial judge acquitted the accused and the Court of Appeal upheld the acquittal. Prior to the hearing in Canadian Supreme Court, the three witnesses pleaded guilty to perjury as a resultant of their testimony at the trial.

[32] Although technically the decision of the Canadian Supreme Court is not binding upon this Court, in my view, is a decision of the greatest persuasive power, and one which this Court must gratefully accept as a correct statement of the law applicable to the present appeal.

[33] I fully subscribe to the view expressed in R v B case, supra, that the time has come for the rule limiting the use of prior inconsistent statements to impeaching the credibility of the witness to be replaced by a new rule recognizing the changed means and methods of proof in modern society. This will be in keeping with the development in other democratic societies.

[34] In *S v Mafaladiso en andere 2003(1) SACR 583 (SCA) at 584,* where there were material differences between the witness's evidence and prior statement, it was held that the final task of the trial judge was to weigh up the previous statement against *viva voce* evidence to consider all the evidence and to decide whether it was reliable or not and whether the truth was told, despite any shortcomings.

[35] In S v N 1979(4) SA 632(0), the state witness deviated from the sworn statement he had made to the police. It was held that the primary task of the court is to find the truth in the interest of justice. Striving for that goal, may even make it necessary to determine whether the statement to the police or the evidence in court reflects the truth.

[36] In R v B case, supra, it was held that a trial must always be a quest to discover the truth. Irrational and unreasonable obstacles to the admission of evidence should not impede the quest. In order to reach a true verdict a court must be able to consider all the relevant admissible evidence.

[37] For that reason the basic principle in evaluating evidence is that evidence must be weighed in its totality. In this regard ***NAVSA JA*** *in S v Trainor 2003(1) SACR 35(SCA) at41b-c* said the following:-

> 'A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course; must be evaluated

> against the onus on any particular issue or in respect of the case in its entirety....'

In this case the compartmentalised and fragmented approach of the evidence by the learned magistrate was criticised as illogical and wrong.

[38] Cases referred to above show that the trial court is enjoined to evaluate and weigh the evidence in its totality in order to come to the truth. The trier of facts must have regard to all evidence and to all such considerations as reasonably invite classification. See *S v Zitha 1993 (11) SACR 718 (A) at 720 i-721a.*

[39] It has been argued on behalf of the appellant that since the witness disavowed his previous inconsistent statement at the trial such statement should have been admitted as an exception to hearsay. I have, therefore, to decide whether the statement constituted hearsay as alleged. Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 (the Act) defines hearsay evidence as '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.'

[40] In the present case, the declarant to the statement testified as well as the police officer who took down the statement. However, the statement consisted of the direct evidence and the information received from the appellant and his erstwhile co-accused. Rule 801(1) (d) of the Federal Rules of Evidence provides;

> 'a statement is not hearsay if-
>
> 1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ….'

[41] If the witness admits on the stand that he made the statement and that it was true,

he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. In *casu,* the witness admitted making the statement and said that the statement was made by the police and drummed it into him and that he did not have any knowledge of the truth of the facts contained therein. He therefore denied the truth of the statement. Also, he went on to allege that he did not make the statement freely and voluntarily since he had for fear of an assault and being tubed by the police made the statement.

[42] This Court should accordingly, first decide whether the statement was made by the police or the witness. In the statement the witness stated that the boy whom the appellant had dispossessed of the knife reported that the boys he had been fighting with had returned. Whereupon the appellant and his erstwhile co-accused went outside to investigate and on their return, they both reported to the witness that a person had been injured outside. They stated that each of them had shot the person in question. Then each of them handed a 9mm pistol to the witness to hide so that the police would not find them in their possession. This information could not have been acquired other than by being involved in the commission of the offence or being present at the time and place where the offence was committed. The person who could have knowledge of what transpired immediately prior to and after the death of the deceased, was the witness. Nor could the police have known that the firearms the witness had received from the appellant and his erstwhile co-accused were buried in the witness's garden, unless they had implanted them. There was no such allegation or evidence. Instead, the witness said that the firearms belonged to his deceased brother. Therefore, it follows that the police would not have known all this. The only reasonable inference which could be drawn in the circumstances is that the witness was the author of the statement and that he had personal knowledge of the truth of the facts contained therein.

[43] The second question to decide is whether or not the statement was made freely and voluntarily. At the time the witness made the statement he was not charged and he only made the statement as a witness. No evidence was led to show that the witness had

made any attempts to lay an assault charge against the police. Moreover, the witness did not allege that he was in fact assaulted and tubed to make a statement but on his own version he made it for fear of being assaulted or tubed by the police. No evidence was led to show that immediately prior to the making of the statement the police had threatened him with an assault or tubing if he would not make the statement. It was common cause that on their arrival at the witness's homestead the police invited his aunt to be present when the witness was taking out the firearms. If the taking out of the firearms was a result of coercion, the police would not have liked to have someone present to witness an assault on or a threat against the witness. That the firearms were given to him by the appellant and his erstwhile co-accused to hide was not inculpatory. The police could not have coerced the witness to write an exculpatory statement. In the premises, the possibility of the statement being made involuntarily did not exist. Accordingly, this leaves no doubt that the witness made the statement freely and voluntarily.

[44] In accepting the previous inconsistent statement as substantive evidence the accused's interest must be carefully balanced with the interest of the society in seeing justice done. Section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) guarantees the right to a fair trial. This is defined to include the right to 'adduce and challenge' evidence. *See section 35(3) (j) of the Constitution and S v Magadu 2008(1) SACR 71(N) at 77.*

[45] In R v B case, *supra,* it was held that since the common law rule is an incarnation of the hearsay rule, a reformed rule must also deal with the "hearsay dangers" of admitting prior inconsistent statements for the truth of their contents, namely; the absence of an oath or solemn affirmation when the statement was made, the inability of the trier of facts to assess the demeanour, and therefore the credibility of the declarant when the statement was made, and lack of contemporaneous cross-examination by the opponent. With the oath, solemn affirmation or solemn declaration and the warning, the first "hearsay danger" is satisfied.

[46] Although the witness denied the truth of the facts contained in the statement, the

safeguards for admitting the statement as evidence existed: The witness had made the statement under oath to the police. Also, as the declarant, he, the witness, testified at the trial on the statement. He was subjected to full and effective cross-examination by both the prosecution and the defence. He was thereby afforded an opportunity to explain the inconsistencies in his prior statement and the truth of the facts contained therein. The purposes of cross-examination are, to elicit evidence which supports the cross-examiner case and to cast doubt upon the evidence given for the opposing party. The police officer who took down the statement also testified as to the circumstances under which the statement was made and that the witness had personal knowledge of the truth of the facts contained therein.

[47] The witness testified at the trial as to what transpired prior and after the killing of the deceased save that he did not say that after the shooting incident the appellant and his erstwhile co-accused gave him two 9mm pistols to conceal. Had the latter evidence been given orally at the trial, it would have been admitted as direct evidence against the appellant and his erstwhile co-accused, establishing the fact. What the appellant and his erstwhile co-accused did and say prior to going outside to investigate and on their return, also constituted direct evidence as to what transpired in the presence of the witness. As an analogy *see section 34(1) (a) (i) (b) of the Criminal Procedure Act, 51 of 1977*. However, the evidence relating to that a person had been shot outside and how the deceased met his death was hearsay since its probative value entirely depended on the credibility of the appellant and of his erstwhile co-accused. Since this piece of evidence was reliable and reasonably necessary, in my view, it was in the interest of justice to admit it as an exception to hearsay rule.

[48] Subparagraphs (iv) and (vi) of section 3(1) (c) of the Act require the court to take into account both the probative value and the prejudicial effect of an item of evidence.

[49] The statement has probative value in that it reinforces the reasoning by inference that the appellant and his erstwhile co-accused were responsible for the death of the deceased. It explained what occurred prior, during and after the killing of the deceased,

how the appellant came in possession of the spent cartridge which was later ballistically linked to the firearms recovered from the witness and how the witness came in possession of the two firearms. The fact that the two 9mm pistols were recovered in possession of the witness lends much credence and reliability to the prior statement. The compelling justification of its admission as evidence in *casu* is the numerous pointers to its truthfulness, as stated above. The statement is a strong corroboration in all other evidence for the self-incrimination of the erstwhile co-accused and the implication of the appellant in the present case. The linking of the firearms found in possession of the witness to the spent cartridges lifted on the scene and the one received on the scene from the appellant meshes in detail with what the erstwhile accused said in his pointing out statement and interlinks with the evidence relating to the following of the deceased and Banda from the bar premises and the firing of two shots.

[50] With regard to the probative value of the hearsay evidence, in S v Ndlovu and others 2002(2) SACR 325(SCA) at paragraph 44, the court found high probative force in the powerful way in which all the evidence in that case interlinked and completed the mosaic of the state case. In *Skilya Property Investments (Pty) Ltd v Lloyds of London 2002(3) SA 765 (T) at 804 C-D,* the court took into account the manner in which the hearsay evidence reinforced the other evidence and supported the basis of suspicion.

[51] There is no violation of an accused's constitutional right to a fair trial if the accused or defence has been afforded and opportunity to cross examine the declarant and test the reliability of the statement. The prejudice may also be offset by the fact that the statement was made under oath. The presence of the oath, solemn affirmation or solemn declaration increases the evidential value of the statement.

[52] In conclusion the court in the present case was entitled to make substantive use of the previous inconsistent statement by the hostile witness and to give the statement, as evidence, the appropriate weight after taking into account all the circumstances, as stated above. After illustrating how the previous inconsistent statement inexorably interlinked with all the evidence tending to prove the guilt of the appellant, I deem not necessary to

deal at length with the question whether the guilt of the appellant was proved beyond reasonable doubt. As shown above, the evidence adduced before court including the prior statement was sufficient for conviction on a charge of murder. The appellant did not testify and explain how he came in possession of the spent cartridge which he handed over to Mdletshe on the scene. It was not in dispute that the appellant did so. Nor did he deny that one of the 9mm pistols recovered from the witness was his. Also, he did not deny that when the two gunshots were fired he and his erstwhile co-accused were standing outside on the bar premises and that on the following morning he telephoned the witness, Zandile Hlatshwayo, and told her that a dead body of a person had been found lying outside the bar. This is evident that the appellant had guilty consciousness and he was fully aware that the witness had seen him the previous night. Even on the scene of murder on the following morning, he beckoned the witness but she ignored him.

[53] In the premises, I do not find any merit in the appeal against conviction and it, therefore, falls to fail. In the result the appeal against conviction is dismissed.

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MADONDO J

I agree

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SISHI J

Date reserved on: 4 January 2011

APPEARANCES:

APPELLANT:
Instructed by: Messrs Noxaka Mfungula & Co

RESPONDENT: Adv Watt
Instructed by: The Director of Public Prosecutions