



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: **A73/2017**

In the matter between:

SIFISO KENNETH FIHLELA

Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL J *et* NAIDOO, J

JUDGMENT BY: NAIDOO, J

HEARD ON: 28 AUGUST 2017

DELIVERED ON: 3 MAY 2018

INTRODUCTION

- [1] The appellant was charged with one count of Murder (count 1) and one count of Robbery with Aggravating Circumstances (Count 2), in the Regional Court, Bloemfontein. He pleaded not guilty to both counts, but was convicted of same after the trial proceeded, and he was sentenced on 29 August 2013 to Fifteen (15) years' imprisonment on each count. The appellant applied to the court *a quo* for leave to appeal against the conviction and leave was granted accordingly. I note, however, that counsel for the appellant erroneously indicated in his oral address in court that the appeal lies against the conviction and sentence. Mr JD Reyneke represented the appellant in this court and Mr R Hoffman represented the respondent, being the state.

BACKGROUND

- [2] Tsietsi Lazarus Madibola, also known as Vusi, received a call at approximately 8h00 on 4 September 2011, informing him that his nephew, Dumelo Vernon Modibola (the deceased), had passed away. He called the deceased's cellular telephone number, and the person who answered told him he was at a tavern. Upon going there, Vusi was not able to find that person who had earlier answered the telephone. He then decided to visit another tavern, and using a cellular telephone belonging to someone else, Vusi called the deceased's telephone again. It was answered by someone who said he was at a tavern in another township. Vusi realised that the music he could hear on the telephone was the same as that in the tavern he was in. He went in search of the person who answered the telephone and came upon the appellant, who said that the cellular telephone that was in his possession belonged

to him (the appellant) but he was unable to provide the number to the witness. Vusi then dialled the number of the telephone and it rang. The appellant was then apprehended by this witness.

- [3] Earlier while he was sitting at the tavern, Vusi noticed the appellant enter the tavern wearing shoes, which appears to be sports shoes, (commonly referred to as “takkies”), that looked similar to those that the deceased had owned. Vusi also testified that, acting on information that he received, a second cellular telephone belonging to the deceased was recovered from the first state witness, Tshepo Mokoankoeng. This was confirmed by the first state witness, who testified that he had bought the telephone from the appellant a few hours earlier. Vusi’s brother, Oupa arrived at some stage and it appears that the appellant was taken by Vusi and Oupa to the police station where he was detained. From a photograph album of the scene, depicting the body of the deceased, it appears that the deceased was barefoot and the pockets of his trousers were turned inside out.
- [4] David Oupa Motshabi (Oupa), uncle of the deceased and brother of Vusi corroborated Vusi’s evidence regarding the calls made to the deceased’s cellular telephone. He arrived at the tavern at the stage when Vusi had apprehended the appellant. Oupa searched the appellant and found a home-made knife tucked at his waist. He also indicated that the appellant was wearing shoes that belonged to the deceased, and identified the shoes by some small stones that were stuck on the shoes. It seems that the shoes may have been torn, as Oupa testified that he had promised to buy some glue so that the deceased could fix the shoes. When the accused was handed over to the police, the takkies which the Vusi identified as belonging to the deceased, the knife recovered by Oupa and the two cellular

telephones were handed to the police and entered into the Exhibit Register referred to as the SAP 13 register.

- [5] The accused testified and called two witnesses. His version is that on the morning of the incident, being 4 September 2011, his mother gave him money to pay her clothing account. On his way to the store he saw his girlfriend outside a tavern. He alighted from the taxi he was in, to join her. He ended up inside the tavern where his girlfriend's lady friend, Baratuwa, bought them some ciders. A few minutes later three men arrived and were selling two cellular telephones for R300.00. He purchased these telephones with the money his mother had given him. When he went home, he was in trouble with his mother who demanded her money back. He then decided to sell these two telephones. He managed to sell one of them to the first state witness and while he was still in possession of the other one, Vusi called him on that telephone. The events that unfolded were similar to that narrated by Vusi, and the appellant was ultimately arrested by Vusi. The appellant denied that the shoes he was wearing were taken by Vusi or that a knife was found in his possession. He alleged that his shoes were bought for him by his mother.
- [6] The appellant called his mother and Baratuwa Ntebele (Baratuwa) as witnesses. His mother confirmed that she purchased the shoes worn by the appellant. She also confirmed that she visited him in prison. Baratuwa confirmed the appellant's version that they were at a tavern when three men approached and offered the appellant two cellular telephones for R300.00. She furthermore gave a description of the clothing he wore on that day, as well as the shoes he wore. Her evidence was that the brown shoes he was wearing in

court were the same pair that he wore on the day they were in the tavern.

- [7] It is trite that the state bears the onus to prove the guilt of the accused beyond reasonable doubt and that an accused person bears no onus to prove his innocence. If his version is reasonably possibly true, he is entitled to an acquittal. In this matter, the conviction of the appellant is based largely on circumstantial evidence. It is perhaps useful to briefly examine the timeline revealed by the evidence in this matter. Vusi received the call informing him of the deceased's demise at approximately 8h00 on 4 September 2011. According to him, he called the deceased's cellular telephone at about 9h00, and he encountered the appellant at the tavern at approximately 10h00. The appellant's mother testified that she saw the appellant at home at around 10h00 that morning and after telling him she wants her money back, he left home. The evidence of the first state witness Tshepo is that he bought one cellular telephone from the appellant at approximately 11h00. The accused's version is that after he sold the telephone to Tshepo, he went to the tavern where he received the call from Vusi. I am inclined to accept that the sequence of events is closer to the appellant's version, bearing in mind that Vusi must have been in a state of emotional distress and attempting to find the person who answered the deceased's telephone. It is entirely possible that he may be mistaken about time frames relevant to the incidents in this matter.
- [8] The appellant's mother testified that he slept in the kitchen and she woke him up at 7h00 that morning, in order for him to go and pay her account. His evidence and that of Baratuwa was that the appellant arrived at the tavern, where he saw his girlfriend, some

time after 7h00. There is no evidence about what time the deceased was murdered or what time his body was discovered, but logic dictates that it would have had to be before 8h00 (when Vusi received news of the deceased's death). The evidence for the appellant is that he was at his home since the previous evening and slept at home until he was wakened by his mother at 7h00 on 4 September 2011. There is no evidence on record to gainsay this evidence.

[9] The trial court recognised that the state's case was based on circumstantial evidence, and correctly cited the celebrated case of **S v Blom** 1939 AD 188, which sets out the "cardinal rules of logic" to be followed when dealing with circumstantial evidence. In essence, Blom's case states that the inference sought to be drawn must be consistent with all the proven facts, which must be such that they exclude all other reasonable inferences, save the one sought to be drawn. If the proven facts do not exclude all other reasonable inferences there must be doubt as to the correctness of the inference sought to be drawn.

[10] When dealing with circumstantial evidence, a court is implored not to deal with such evidence on a piecemeal basis but to examine the evidence in its totality. It is also necessary for the court to distinguish between inference and conjecture. [See **S v Reddy** 1996(2) SACR 1 (A); **S v Cooper** 1996(2) SA 875 (T)].

In the present matter, I am of the view that there is no evidence to show the involvement of the appellant in the murder and robbery of the deceased. It is so that he was found in possession of a telephone belonging to the deceased, very shortly after the deceased's family was notified of his demise. The appellant has

tendered an explanation for how he came to be in possession of the telephone.

[11] If regard is had to the fact that the deceased must have been robbed and killed some time before 8h00 that morning, that the appellant was asleep in his home at the time, and was at a tavern by the time the deceased's family was informed of his death, then the explanation tendered by the appellant is reasonably possibly true. That is not to say that his behaviour in attempting to send Vusi on the proverbial wild goose chase is not suspicious. It is clear, on his own version, corroborated by the evidence of Baratuwa, that he entertained the reasonable suspicion that the cellular telephones which he purchased were stolen. He pointedly asked the question of the men who sold the telephones to him. This suspicion must have been confirmed when Vusi called him on one of the telephones and attempted to establish his whereabouts. His conduct in misleading Vusi in the manner he did is a clear indication that he knew that the telephone was stolen, but did not appear to have any intention of returning it.

[12] The defence argued that the trial court misdirected itself in a number of respects, namely by rejecting the appellant's version even in the face of corroboration by his mother and Baratuwa of his version. It was also argued that the trial court harassed and badgered the defence witnesses and descended into the arena by cross examining Baratuwa. The magistrate did indeed express irritation with that witness for moving around in the witness stand. What is disturbing is that the witness indicated that she was not well and hence was leaning on the witness stand. The magistrate ignored this and proceeded in a manner which suggests that she did not believe the witness. Her questioning of the witness was

unnecessarily rigorous and unwarranted, especially the gratuitous comments that the witness' demeanour suggested that she had something to hide. With regard to the evidence of the appellant's mother, the court offered no substantial reasons for disbelieving that she purchased the shoes that the appellant was wearing. The court also incorrectly found that the appellant's mother had a problem answering the question whether she took shoes to him in prison. The witness in fact said she would have asked him where were the shoes he was arrested with. The court's reasoning with regard to the evidence of Baratuwa is erroneous. The fact that she could not remember how many drinks she bought but could remember the logo on the appellant's shoes was the basis for the court's finding that this witness was not credible. As a result the court rejected her evidence.

[13] In my view, small details about where a call was taken and how many drinks were purchased were not sufficient grounds for rejecting this witness' evidence. The court did not deal with the corroboration offered by this witness for the appellant's version that he purchased two cellular telephones from three men who approached him in the tavern. After the state and defence closed their respective cases, the court called the investigating officer (Nthombeni) to offer clarity on whether the appellant was arrested barefoot and how the exhibits were entered into the SAP 13 register.

[14] It was clear that Nthombeni was not present when the appellant was brought to the police station, or when the exhibits (the knife, cellular telephones and shoes) were entered into the SAP 13 register. The evidence of the state witnesses was that they arrested the appellant and handed him and the exhibits to the police. The SAP13 register reflects that these items belong to the appellant, whereas the state

witnesses testified that at least one telephone and the shoes belonged to the deceased. It was indeed disturbing that the court referred to Nthombeni as its “client” and proceeded to suggest to him that when he observed the appellant to be barefoot, he thought that the shoes entered in the SAP13 register belonged to him.

- [15] In my view, the trial court did not properly apply the principles set out in Blom when dealing with the circumstantial evidence in this matter. While an inference may possibly be drawn that, in view of the appellant being found in possession of the deceased’s property, he was involved in the murder of the deceased and robbery of his property, this is not the only inference that can be drawn. The facts of this case also lend themselves to the inference that the appellant received the cellular telephones knowing them to be stolen and reconciled himself with this knowledge. Therefore the correctness of the inference drawn by the trial court that the appellant was responsible for the death and robbery of the deceased is in doubt. I am of the view that a conviction in terms of section 37 of the General Law Amendment Act 62 of 1955 would be the most appropriate. In **S v Mani** 2002(2) SACR 393 (EC), it was held that “where the evidence did not indicate that the accused had participated in the actual theft of a stolen motor vehicle found in his possession, but that he had become aware of the fact that it was stolen and had not participated in the disposal of the motor vehicle, which he was retaining for his own use, he was guilty of receiving stolen property and not theft”. I agree with this view. The dictum of the court in Mani finds application in this matter, as it is clear that the appellant entertained a reasonable suspicion that the cellular telephones were stolen, which was confirmed when Vusi tried to locate him, but he retained the one in his possession for his own use.

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

16.1 The appeal succeeds in respect of count 1 (Murder), and the conviction and sentence in respect thereof is set aside

16.2 The conviction and sentence in respect of Count 2 (Robbery with Aggravating Circumstances) is set aside and substituted with the following:

16.2.1 The accused is found guilty of contravening Section 37 of Act 62 of 1955.

16.2.2 The accused is sentenced to Three (3) years' imprisonment.

16.3 The sentence in 16.2.2 is antedated to 29 August 2013.

NAIDOO J

I concur

VAN ZYL J

Instructed by: The Justice Centre
Bloemfontein

On behalf of Respondent: Adv. R Hoffman
Instructed by: The State