

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A264/2013

In the appeal between:-

TEBOHO MEJE

1st Appellant

LEBOHANG FRANS MOCUMI

2nd Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI AJP, KRUGER *et* CJ MUSI, JJ

JUDGMENT BY:

THE COURT

HEARD ON:

26 MAY 2014

DELIVERED ON:

29 MAY 2014

THE COURT:

- [1] The two appellants were convicted of murder and robbery with aggravating circumstances and they were each sentenced to life and 15 years' imprisonment on 8 October 2008. The trial court refused leave to appeal. Leave to appeal was granted by the Supreme Court of Appeal on 19 March 2013 in respect of the

convictions only. The appellants were respectively accused 2 and 3 in the trial court, and are referred to as such in this judgment. Accused 1 was acquitted by the trial court. The deceased was robbed of a state-owned white Corolla vehicle and murdered on the evening of 25 November 2005. No eye witnesses identified the appellants as his assailants.

- [2] The question in this case is whether the evidence of a single witness implicating the appellants was sufficiently cogent to justify the conviction of the appellants. The appellants did not testify. Their view was that there was no case to meet.
- [3] The only evidence implicating the appellants is that of Silas Tebane Leeto, who testified that on the morning after the robbery and murder, at 04:00 he received a telephone call from accused 3, who lived in the same area as Leeto. Accused 3 told Leeto that he and accused 2 had a car they wanted to sell. Leeto knew that a certain Sparks wanted a car. At 05:00 the two arrived at Leeto's place with a white Corolla that had no registration number at the front. Accused 2 told Leeto that accused 3 had shot the owner of the Corolla. Accused 2 and 3 left, accused 2 was driving the Corolla. Accused 2 told Leeto that they were going to leave the car in Zone 2. After they had left, Sparks called Leeto. Accused 2 and 3 returned to Leeto later that same day at 11:00 wanting to know what Sparks had said. In cross-examination it emerged that Leeto told Sparks that the owner of the vehicle had been shot, upon which Sparks said he was no longer interested in the car.

- [4] The police statement of Leeto was handed in during cross-examination. He initially agreed that the statement was read back to him and he confirmed the contents thereof. Later he said that he did not read the statement before he signed it. In cross examination he said that he did not tell the police official who took the statement that accused 2 and 3 came to his house at 05:00 with the vehicle and that the vehicle did not have a registration number at the front. Asked why he did not say that to the police, Leeto responded that he did not know why, adding that the other person was a detective, he knows his work. Pressed further, Leeto said it did not come into his mind to tell the police that the vehicle did not have a number plate and to say that the accused brought the vehicle to him at 05:00. He testified that he worked as a driver at a firm of attorneys. Asked why it took him a year and five months to go to the police he said the police came to him, he did not go to them. It never occurred to him to go to the police and report the matter to them. Why it took the police a year and five months to get a statement from Leeto was never explained. Neither does it appear from the record why the cell phone records of Leeto or accused 3 were not requested and presented as evidence. There is no evidence incriminating the accused other than that of Leeto.
- [5] In the judgment the trial judge said it had to be acknowledged that Leeto was not convincing regarding his explanation of why the accused would wake him up at 04:00 to discuss something he had never been involved with, namely the sale of stolen vehicles. The trial judge had a lingering suspicion that Leeto may have been part of a syndicate involved in car thefts and that he was perhaps

concealing his true role in order to save his own skin. Yet, on the other hand, the judge said that there was nothing to suggest that he would falsely incriminate the accused. The trial judge said he was painfully aware of the culture in townships of being reluctant to expose the wrongdoings of friends, relatives and acquaintances and to testify about those in court. The trial court found Leeto's account full and credible. The trial court found that Leeto's evidence that when the accused returned at 11:00 they were travelling in accused 2's Chevrolet could not be a fabrication. The trial judge did not expand on or give reasons for this finding. As to the discrepancies between Leeto's evidence and his police statement the trial judge found that the police statement is a summary and cannot stand on the same footing as evidence in court. As to the fact that the name of the deceased from whom the vehicle was taken, George, is mentioned in the statement, whereas Leeto says he did not know the deceased and the name of the deceased was not mentioned by the accused, the trial judge found that Leeto's explanation that he did not know how that name came to be mentioned in his police statement, could not be challenged. This finding is not expanded on. The trial judge found the fact that the deceased's vehicle was found in a nearby forest supported the evidence that the proposed buyer withdrew. It is difficult to see how the finding of the vehicle supports or contradicts the evidence of Leeto.

- [6] The law regarding inferences to be drawn from contradictions between evidence in court and police statements has been dealt with in a number of cases. Generally omissions from police statements, regarding aspects on which the witness expands in

court, will not be held against a witness. The position is different where there are assertions in the police statement that are disavowed by the witness in court. In this case, the mentioning of the name of George, the deceased, which Leeto says he never told the police, was mentioned in the statement but disavowed in court by Leeto.

- [7] Before a witness can be discredited because of differences between a police statement and evidence, there have to be material discrepancies (**S v Bruiners en 'n Ander** 1998 (2) SACR 432 (SECLD) at 437g-j). In **S v Mafaladiso en Andere** 2003 (1) SACR 583 (SCA) at 593i-j Olivier JA points out that where there are contradictions, the court should in the first place determine what the witness really intended saying on each occasion. Secondly, not every contradiction affects the credibility of a witness (594c-d). Thirdly, the contradictory versions must be compared and evaluated holistically (594d-e). Lastly the trial judge must weigh up the statement against the *viva voce* evidence of the witness (594f-g). In **S v Govender and Others** 2006 (1) SACR 322 (ECD) Nepgen J repeated the requirements listed in **Mafaladiso** and added that regard must also be had to the type of person the witness is, and cultural differences (at 326c-j). Some witnesses give ill-conceived and nonsensical answers when they find themselves in a perceived predicament (326e-f).
- [8] Leeto was not an unsophisticated or completely uneducated man. He worked as a driver for a firm of attorneys. He said he believed detectives knew their work. The discrepancies between what he said in evidence in court and what was left out of the statement, go

to the two core elements of the case against the appellants: (i) the identity of the deceased and (ii) the vehicle. In the statement he does not mention that he saw the vehicle at all, but in his evidence he says he saw the vehicle and that it did not have a registration number at the front. In the statement he mentions the name of the deceased, George, but in his evidence in court he says he never mentioned the name George or the name of the deceased, to the police.

[9] These discrepancies cannot be explained by having regard as to what the witness really intended to say on each occasion. The police were investigating the robbery of the vehicle and the murder of the deceased. One would expect the statement to deal with those two elements. Yet Leefo says in re-examination that he did not mention George, he did not even know who George was. As to language, Leeto says he and the police official taking the statement understood each other because they were speaking the same language.

[10] The state failed to make out a case against the appellants. Counsel for the respondent, Mr Strauss, at the outset of his argument in court conceded that the appeal should succeed.

ORDER

1. The appeal succeeds.
2. The convictions and sentences of both appellants are set aside.

MH RAMPAL, AJP

A KRUGER, J

CJ MUSI, J

On behalf of 1st appellant:

Adv J Nel

Instructed by:

Kramer, Weihmann & Joubert Inc.

BLOEMFONTEIN

On behalf of 2nd appellant:

Adv PW Nel

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of the respondent:

Adv M Strauss

Instructed by:

Director Public Prosecutions

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