

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

Appeal Number: A184/2014

In the appeal of:-

MONYAANE ISHMAEL MOHLOMI

Appellant

and

THE STATE

Respondent

CORAM:

VAN DER MERWE, J *et* MURRAY, AJ

JUDGMENT BY:

MURRAY, AJ

HEARD ON:

3 NOVEMBER 2014

DELIVERED:

12 DECEMBER 2014

- [1] This is an appeal against the Appellant's conviction of murder in the Regional Court, Senekal, where he was sentenced to 15 years' imprisonment. His application for leave to appeal was dismissed, but his petition to the High Court succeeded. Although he was granted leave to

appeal against both the conviction and the sentence, this appeal lies only against his conviction.

- [2] Two accused were charged with the murder. Both pleaded not guilty, and only the Appellant (Accused 2) was convicted. He denied being at the crime scene and raised an *alibi* defence. The trial court convicted him on the evidence of a single witness, Ms Motaung, for whose evidence regarding his presence at the crime scene it found corroboration in the evidence of Accused 1.
- [3] Accused 1 was acquitted. Although his statement before a magistrate was received as Exhibit “C” and his written plea explanation as Exhibit “A”, the documents were neither read into the record nor included in the appeal record. In court he merely said that he abided by the contents of the statements and did not present any evidence in chief. This is of serious concern since the contents of the statement and plea explanation might have had a significant bearing on Accused 1’s credibility and might have had material implications for the Appellant’s conviction. The problem is further compounded by the trial court’s failure, in a brief 2-page judgment, to motivate its acceptance of Accused 1’s evidence while rejecting the Appellant’s.

[4] An accused is entitled to be informed of the judge's reasons (See: **S v Maake**¹.) It is as important that another court which has to consider the case be given the advantage of the trial court's reasons. In **Protea Assurance Co Ltd v Casey**² the Court warned that especially if the matter had to be decided merely on the record, as *in casu* where the record is not even complete, the burden of proof plays a very important part. In an ordinary criminal case this has been held to entail that a court of appeal's doubt results in the acquittal of the accused.³ In the present instance, however, Counsel were agreed that this appeal can be properly decided on the record despite the missing exhibits.

[5] The trial court found that it had only Ms Motaung's version of the events of the night in question, but it had a problem with her evidence. It found her to have been vague on certain aspects and her high alcohol consumption to have affected the quality of her evidence. In its view, although her evidence in chief appeared to be very good, her evidence under cross-examination could not simply be accepted as conclusive without finding corroboration regarding the Appellant's presence in Accused 1's evidence.

¹ 2011 (1) SACR 263 (SCA) at para [19]

² 1970 (2) SA 643 (A) at 648 E

³ Hiemstra: Criminal Procedure, *supra*, Issue 7 at p. 30-46.

- [6] The trial court's explanation for Accused 1's acquittal was that he had made a statement shortly after the event and repeated its contents in court, although it appears from the record not to be the case, and that '*certain similarities*' between his evidence and that of Ms Motaung corroborated her version. Despite being '*not quite satisfied with his version*', and despite '*discrepancies and evidence that was not quite acceptable*' the trial court found his version to be '*reasonably possibly true*', gave him the benefit of the doubt and acquitted him.
- [7] The trial court disposed of the Appellant in two sentences. It held that it could not accept the Appellant's reason for accusing Ms Motaung of giving false evidence and that on Ms Motaung's evidence as corroborated by Accused 1's there was no doubt about the Appellant's guilt. It then convicted the Appellant as charged.
- [8] The pertinent facts on Ms Motaung's version are that at around 22h00 on 15 May 2009 at the Old English Pub in Senekal the deceased asked her to drive with him to Paul Roux. They stopped to offer the Appellant and Accused 1 a lift. She recognised both of them from having seen them in town before. Along the way, after both the Appellant and Accused 1 had on two separate occasions asked him to stop to allow them to urinate, the deceased asked the Appellant and Accused 1 for payment for their transport. Informing them that if they could or would not pay, they might

as well get out right away, he stopped the car and the three of them got out. Ms Motaung remained in the car at first.

[9] She heard an argument outside the car. She saw the Appellant and Accused 1 disappear into the bush, one of them dragging the deceased. She did not see what they were doing, but heard a noise and what sounded like a scream. It gradually died down, but she was too scared to go and look. She got back into the car and locked the doors. When the Appellant and Accused 1 reappeared she saw that both their clothes were blood-stained. Accused 1 at some stage threatened to stab her, too, and the Appellant told him not to. The deceased she did not see again.

[10] After Accused 1 had tossed away the car keys, the three of them got a lift from a truck to a township near Senekal. At Accused 1's home the two men changed their bloodied clothes. She waited at a friend of Accused 1's house while the Appellant and Accused 1 accompanied the said friend to a tavern. Upon their return, the Appellant slept with her for payment.

[11] Accused 1 testified that he was with the Appellant when the deceased gave them a lift and confirmed that they on two occasions asked the deceased to stop the car. According to him, however, the Appellant was

the one who killed the deceased while he tried three times to stop the Appellant, once while the Appellant and the deceased were fighting in front of the car; then when the Appellant started to stab the deceased and dragged him to the side of the road before dragging him into the bush, then when the deceased escaped and ran to the car, walked around it and tried to get in, before the Appellant caught him again and dragged him back into the bush; and thereafter when the deceased escaped once more and was dragged back to the bush again. He maintained that he got blood on his clothes when the deceased grabbed him, asking for help, and they both fell. He claimed that after his first attempt to stop the Appellant, he remained standing next to the car with Ms Motaung, listening to the sounds the knife made during the stabbing. According to him, Ms Motaung witnessed everything, including the stabbing.

- [12] The Appellant denied having been at the murder scene at all. He alleged that he spent the evening and the first part of the night with his cousin at a tavern. He promised to call the cousin to confirm his *alibi*, but by the time the case was heard, the cousin had passed away. Although the Appellant admitted that he slept with Ms Motaung in the early hours of the morning at Accused 1's friend's house, he denied having been in the deceased's car with them. He maintained that Ms Motaung falsely implicated him because she was angry at him for merely paying her R20 instead of the R30 she had asked.

[13] There are three reasons why the trial court should have treated the evidence of the key State witness, Ms Motaung, with caution. First of all, she was a single witness as defined in **S v Lotter**⁴ since the Appellant's conviction rested solely on her evidence. On that ground, the trial court therefore had to apply the cautionary rule applicable to single witnesses in evaluating her evidence⁵. It merely mentioned that she was an 'only' witness, however, and whether it appropriately applied the rule, is not clear.

[14] Secondly, Ms Motaung was under the influence of alcohol during the incident. It need hardly be said that a court should be particularly vigilant in a case where a single witness was intoxicated at the time of the events he or she describes. Her intoxication clearly affected her ability to remember the events in specific detail and in cross-examination she contradicted some of her earlier averments. This rendered her evidence regarding material events extremely vague.

[15] Thirdly, Ms Motaung's evidence was identification evidence since the Appellant denied that he was at the crime scene. That means that her evidence needed to be not only credible but also reliable to obviate the possibility of false identification (See **S v Mtethwa**⁶). In order to convict

⁴ 2008 (2) SACR 595 (C)

⁵ S v Heslop 2007(1) SACR 46 (SCA) at para [14]. See also S v Janse van Rensburg 2009 (2) SACR 416 at paras [9] to [10].req

⁶ 1972 3 SA 766 (A) at 768

the Appellant on her evidence, the trial court therefore needed to examine not only her credibility, but also the reliability of her evidence with regard to such factors as the degree of her intoxication and the effect thereof on her perception, the lighting, the visibility, her proximity to the Appellant, the time spent in the Appellant's presence, and especially her prior knowledge of the Appellant. The judgment does not indicate that it did so.

[16] On appeal the State supported the Appellant's conviction. In support thereof it was argued that Ms Motaung's evidence regarding her identification of the Appellant was not problematic because she knew him before the murder, the lighting in the area where they picked up the two men and the lighting in the car was sufficient to identify him, and she spent the night with him. It contended that she evidently did not out of malice falsely identify him since she made no attempt to implicate him more directly in the murder.

[17] The trial court found that a conviction could not be based on her evidence alone. Although for the reasons alluded to by counsel for the Respondent, the finding is indeed open to some doubt, this Court cannot as a court of appeal be convinced that it is wrong. The judgment was rendered by an experienced magistrate who certainly was in a more favourable position than this Court to judge what is probable or

improbable in the light of its observation of the witnesses and its insight into the exhibits that are absent from the record before us.⁷

[18] The trial court nevertheless convicted the Appellant on the basis that Accused 1 corroborated Ms Motaung's evidence. In this respect the trial court erred. On Ms Motaung's evidence Accused 1 was a co-perpetrator. His evidence therefore had to be treated with special caution (See **S v Radloff**⁸ and **S v Mocke**⁹) even when he testified in his own defence (See **S v Johannes**¹⁰ and **S v Dladla**¹¹). It is clear that the trial court failed to do so.

[19] Before a trial court convicts on the evidence of an accomplice (or, even more pertinently, of a co-perpetrator), it must satisfy itself as to the merits of the evidence of both accused (See **R v Ncanana**¹²). Accused 1 was a most unimpressive witness. Several material aspects of his evidence were never put to the State witnesses, which adversely impacts on his credibility. His evidence contained several improbabilities and it was obvious that he was attempting to distance himself from the crime. On proper consideration of his evidence, especially in view of the strong

⁷ S v Hassim 1973 3 SA 443 (A) at 456 A – B and R v Dhlumayo 1948 (2) SA 677 (A) at 696 and 705.

⁸ 1978 (4) SA 66 (A) at 74

⁹ 2008 (2) SACR 674 (SCA) at paras [6] – [7]

¹⁰ 1980 (1) SA 531 (A) at 532 - 533

¹¹ 1980 (1) SA 526 (A) at 529

¹² *Supra* at 406

probability of his being at least a co-perpetrator, his evidence could not be relied upon to support a conviction.

[20] The Appellant disputed the credibility of Ms Motaung and of Accused 1. He maintained that the State did not prove beyond a reasonable doubt that he was indeed the perpetrator who killed the deceased. It is true, of course that the State has the onus of proving the guilt of an accused person beyond a reasonable doubt and that there is no onus on an accused to prove his innocence¹³

[21] In my view, although the trial court correctly treated Ms Motaung as a witness whose evidence was not credible in all respects and therefore needed corroboration, the trial court completely failed to take into account that Accused 1 himself could very well have been the perpetrator and as such would have had a strong motive to falsely shift the blame onto the Appellant.

[22] Not only did the trial court *in casu* need to consider the evidence in totality (See **S v Chabalala**¹⁴) together with its impressions of the witnesses,¹⁵ but it had to keep in mind, throughout (See **S v Hlapezula**¹⁶), that the ultimate requirement for conviction of an accused is proof beyond a

¹³ S v Moleko 1995 (2) SA 401 (AD).

¹⁴ 2003 (1) SACR 134 (SCA)

¹⁵ R v Hlongwane 1959 3 SA 337 (A) at 341A.

¹⁶ *Supra*, at 440G - H

reasonable doubt upon appraisal of all the evidence and the degree of the safeguard applied against a wrong conviction.

[23] The trial court's use of the unspecified '*certain similarities*' in the highly questionable and in my view unacceptable evidence of Accused 1 to corroborate Ms Motaung's equally inadequate evidence failed to establish the required proof beyond a reasonable doubt to convict the Appellant of the murder.

[24] This Court therefore has no other option than to set aside the Appellant's conviction.

THEREFORE I MAKE THE FOLLOWING ORDER:

1. The appeal succeeds and the conviction and sentence are set aside.

H MURRAY, AJ

I concur.

C H G VAN DER MERWE, J

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