

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A269/12

In the appeal between:-

SHADRACK MPONENG

Appellant

and

THE STATE

Respondent

CORAM:

C J MUSI, J *et* MOLOI, J

HEARD ON:

11 MARCH 2013

DELIVERED ON:

28 MARCH 2013

JUDGMENT

K.J. MOLOI, J

- [1] This is an appeal against the conviction and sentence imposed by the magistrate. The appellant was convicted of murder and kidnapping and sentenced to 15 (fifteen) years imprisonment and 3 (three) years imprisonment, respectively. The sentences were ordered to be served concurrently. The trial court granted the appellant leave to appeal.

- [2] The evidence of the State was that on 17/18 March 2007 at Kutlwanong in Odendaalsrus the appellant pulled the deceased, Serialong Mirriam Morothodi, from her boyfriend, Tamsanqa Wabonga, as they entered TNT tavern and left with her. At a later stage the appellant sought assistance from his relative, Morepo Benson Litheko, to go and look for the deceased. They found her in a veld where she was lying and her head and face were full of blood. The appellant and the said Litheko took the deceased in a wheelbarrow to Litheko's house. The appellant later brought a blanket and a pillow to cover the deceased. The appellant did not contact the police until one Simphiwe arrived at the scene with him, and the police were contacted telephonically and arrived promptly at Litheko's house where they found the deceased and called emergency services to remove the body of the deceased.
- [3] The appellant took the police to the scene where the deceased was found and the appellant told them what led the deceased to be at that point in the veld. According to the appellant the deceased was his girlfriend and they had arranged to meet at TNT tavern that evening from where they would go to his grandfather's house to sleep. They found the grandfather awake and the house lit. As a result they moved to the place where lovers meet. There they were confronted by four men, two of whom attacked him while the other two attacked the deceased. He got loose and ran to Litheko's house for assistance. He went back to the scene with Litheko where they then moved the deceased to

Litheko's house. This version was also given in his plea explanation, repeated to Litheko and the police when they arrived at Litheko's house.

- [4] According to Litheko when the appellant arrived at his house for the first time the evening, his shirt was already blood-stained and it was later established through DNA tests that the bloodstains on the appellant's shirt matched the deceased's blood. According to the appellant the bloodstains got onto his shirt when he lifted the deceased and placed her on the wheelbarrow. According to Wabonga the appellant pulled away the deceased from him (he and the deceased were holding hands) and he only followed them for a short distance and stopped. The appellant was a police reservist, but went from one place to another without calling the police.
- [5] In its judgment the trial court found it improbable that the appellant and the deceased had an appointment to meet at the tavern after accepting that Wabonga was, indeed, in a relationship with the deceased and saw the appellant taking her away at the tavern. The magistrate found that the appellant's version was improbable (onwaarskynlik), contradictory (self-weersprekend) and unconvincing (onoortuigend). He rejected the appellant's version that he and the deceased had agreed to meet that evening and that where the appellant and deceased were confronted by four men, they were discussing their problems. The magistrate rejected the explanation by the appellant as to how the

deceased's blood got onto his shirt. He found it surprising (uiters verstommend) why the appellant failed to call the police before Simphiwe arrived and occupied himself with moving around (staptog). He further found that the attack on the appellant and the deceased was unusual and he had never come across such an attack in the twenty years of him presiding in cases. He further found that the type and number of injuries inflicted on the deceased could only be caused by a jealous lover. He concluded that the appellant's version was improbable (onwaarskynlik) and was lying seriously (erg leuenagtig) and therefore rejected it as not reasonably possibly true.

- [6] In assessing the evidence the court must consider all the evidence placed before it: **S v Van der Meyden** 1999 (1) SACR 447 (W); **S v Radebe** 1991 (2) 166 (T). It must also be borne in mind that there was no onus on the appellant to prove his innocence, while the State had an onus to prove its case beyond a reasonable doubt: **S v Van der Meyden**, *supra*. Where the appellant gave an explanation and this explanation was reasonably possibly true, the court must acquit: **R v Difford** 1937 AD at 370. The court must be satisfied that the accused's explanation is not only improbable but that it is beyond a reasonable doubt false – **R v Matsoso** 1950 (4) SA 178 (O) at 185F – H. In **R v Difford**, *supra*, it was held:

“It is equally clear that no onus vests on the accused to convince the Court of the truth of any explanation he gives. If he gives an

explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his to his acquittal.”

In **R v M** 1946 AD 1023 at 1027 it was held:

“And, I repeat, the Court does not have to believe the defence story: still less has it to believe it in all its details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.”

Great emphasis was placed on the appellant’s lies he told. In **S v Burger and Others** 2010 (2) SACR 1 (SCA) at par 30 it was stated:

“While lies together with other acceptable evidence might in some cases prove an accused’s guilt, courts should be careful to decide against an accused merely as punishment for untruthful evidence.”

- [7] According to Litheko, when the appellant arrived at his house that evening, his (appellant’s) shirt was already blood-stained. The blood on his shirt later proved to be that of the deceased. According to the appellant the deceased’s blood must have got to his shirt when he and Litheko carried her onto the wheelbarrow and conveyed her to Litheko’s house. This is disputed by Litheko who said that he picked up the deceased on her head side where the blood was and the appellant picked her up on her feet end where there was no

blood and thus the blood could not have got onto his shirt. Though it was conceded that the appellant had scratch marks similar to those that may be caused when one fell in a soccer game, those could not have stained the appellant's shirt the way it was. Furthermore, according to the appellant he ran towards Litheko's house when he freed himself from his two attackers without having been to the deceased where she was accosted by the other two attackers.

- [8] It is inexplicable why the appellant who was a police reservist avoided seeking assistance from the police immediately he freed himself from his two attackers. According to him his cellular telephone's battery suddenly got flat after he called a friend, and he could thus not make calls. Even when his relative Simphiwe, who had a cellular telephone, arrived at the scene he did not ask him to call the police until he (the appellant) was asked by Litheko to use Simphiwe's cellular telephone to call the police. From the evidence it is clear that the scene where the deceased was found was not far from the police station and could be reached with ease hence the police arrived promptly at Litheko's house when called eventually.
- [9] The magistrate rejected the appellant's version as not reasonably possibly true, but implicit in his rejection was the fact that the version advanced by the appellant was false beyond all reasonable doubt. I also hold that view.

[10] As a consequence the appeal against both the convictions and sentences must fail and the appeal is dismissed.

K.J. MOLOI, J

I concur and it is so ordered.

C.J. MUSI, J

On behalf of appellant: Mr J.D. Reyneke
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of respondent: Adv R. Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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