

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE NO: KAP 25/2011

HEARD: 13-17/02/2012 &
2/04/2012

DELIVERED: 3 /04/2012

In the matter between:

THE STATE

and

THOMAS SIMON YASO

ACCUSED

JUDGMENT

HUGHES-MADONDO, AJ

1] The accused THOMAS SIMON YASO was arraigned in respect of the following charges: Count 1 Robbery with aggravating circumstances and Count 2 Murder.

2] The State alleges that on 12 February 2011 at 'Lollitta Tuck Shop' in Tshwene Street, Galeshewe, Kimberley, Yaso, robbed AlomgirHoosain and Hadiul Islam by gun point.

3] During the course of the robbery Yaso shot Hadiul Islam. Islam was taken to the hospital however he succumbed to his gunshot wounds and died.

4] The following items were taken from the tuck shop:

Cash to the tune of R 3000.00

Cellphone Airtime valued at R 2000.00

Cigarette's valued at R 900.00

Nokia cellphone valued at R 500.00

Passports of both AlomgirHossain and Hadiul Islam.

5] Yaso pleaded not guilty to both counts preferred. In his section 115 plea explanation, he stated that he was not at Lollitta's on the night in question. He was at a tavern by the name of 'Take Two'.

6] The State called a number of witnesses. I propose to deal

with the salient features that emanate from their evidence.

7] Constable Matome Peter Motokolo of the Kimberley flying squad was first on the scene. He gave an account on his observation and interviews conducted at the scene. On his arrival at Lollitta's, many people were milling around, he was approached by AlomgirHossain, who said he was the brother of the injured person, Islam.

8] On entering the tuck shop Islam was lying on the floor. There was blood where he laid. He had been shot in the abdomen. He also observed a live bullet and cartridge on the floor, whilst a green Heineken Quart Bottle was at the door of the tuck shop.

9] Senior Constable Michael Modise Bogacwi of the detective branch Galeshewe conducted the investigations in this case and arrested Yaso.

10]At the scene through inquiries he met Dennis Louw. Louw informed him that he had seen Yaso jumping over a fence from the yard of the deceased into his yard. Louw said that it appeared as if Yaso was carrying a fire arm. Louw informed him that he knew Yaso very well. He accompanied Bogacwito locate Yaso, who was eventually apprehended on the following day.

11]Magdalene Marumollane is Dennis Louw's grandmother.

They live in the same home. Both knew the accused well and testified on behalf of the State. They said they saw the accused immediately after the incident. Magdalene testified that she had sent Dennis to check what had happened at her neighbour's tuck shop, who had come running into her yard seeking help, after a shot was fired.

12]She testified that on Dennis return, he and the accused approached from different directions. At her gate she had an altercation with the accused who uttered to Dennis "sonny jy spied".

13]During cross-examination Magdelene was confronted with a statement she had made on the 13 February 2011, a day after the incident took place. In this statement it came to the fore that she had never made mention that she had spoken to the accused at the gate. In fact, she said that two unknown men spoke to Dennis at the gate, when one of them said to him" sonnyjy spied".

14]It also emerged during cross-examination that at an identification parade, she could not point out the accused. Instead she pointed out two other persons.

15]TsholofeloPetro, a fourteen year old youth was in the tuck shop, just minutes before the deceased was shot. She testified that there were two men in the store; one of them was short whilst the other was tall. These men were trying to open the safety latch on the gate in the tuck shop. This gate separated the customers from the shop owners.

16]She explained that she did not know these men. When she left the shop these two were still in the shop. When a shot was fired, she presumed that it must have been these men who shot the deceased. When she heard the shot she turned around and noticed the taller one with a firearm in his hand whilst the shorter one was standing behind the tall man.

17]Joy Anthony, a friend of Dennis, explained to this court that he did not see the shooting. He heard about it and curiously he attended at the tuck shop where the shooting had taken place.

18]His evidence is that he saw the accused just before the shooting in Stomper Street. He said he had not known the accused name. Thus before he attended the identification parade, he made inquiries from Dennis as regards the accused name. When asked how he identified the accused, he explained that he did so as he had seen him in the street

on the day in question.

19]AlomgirHoosain, testified that four men entered the tuck shop while he and Islam were attending to the customers. Two stood by the door whilst the other two entered into the store. Those who were in the store, one of the men were tall and the other was short. The taller one was busy trying to open the latch, whilst the shorter stood alongside him.

20]At some stage the taller man pulled out a revolver from his pocket. The witness said that this is when he hid. A shot was fired at Islam. Hoosain then fled through the back entrance and went next door for assistance.

21]Hoosain had not seen the assailants before the incident. He explained that he did not see them after the incident as well. However whilst the accused was in the dock in court he pointed out the accused as being one of the assailants.

22]At the identification parade held two days after the incident, he failed to point out the accused.

23]Ironically he and Magdalene pointed out the same person, Tsepo Hetti and not the accused. Joy Anthony pointed out the accused, however he had made inquiries from Dennis the previous day as regards Yaso.

24]Dennis Louw explained that he went to the tuck shop after the shot was fired and Hoosain had come running into their yard. He testified that he did not enter the tuck shop at all. He said that two men jumped over the wall whilst he stood with Hoosain in the back of his yard. One of those men was Thomas Yaso. He testified that whilst his grandparents were at the gate of their yard and he was at the back with Hoosain, he heard the accused say to his grandparents that he "sonny jyspied". He further testified that he knew the accused very well from as far back as his childhood days.

25]This is a case where the State relies on circumstantial evidence. It is trite that the leading case as regards this type of evidence being accepted is **R v BLOM1939 AD 188, Watermeyer JA held***"The inference sought be drawn must be consistent with the proven facts. If it is not, then the inference cannot be drawn. The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

26]At the close of the State's case Adv. Van Tonder for the accused applied for a discharge in terms of section 174 of the

Criminal Procedure Act 51 of 1977. The application was refused and I now turn to deal with my reasons for the said refusal.

27]Section 174 of the Criminal Procedure Act reads as follows:

"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

28]**S v HUDSON AND OTHERS 1998 (2) SACR 359 at page**

360 G-I, Blieden J said *"This section of the Criminal Procedure Act affords the judicial officer a discretion to discharge the accused or refuse to do so. This discretion is of course to be exercised judicially and not arbitrarily or capriciously. In **S v Shuping and others 1983 (2) SA 119(B) Hiemstra CJ** laid down the test as follows. The first consideration is whether there is evidence on which a reasonable man may convict. If the answer is negative it must be asked whether there is a reasonable possibility that the defence evidence may supplement the State case. If the answer is in the positive a discharge should be refused."*

29] In this case the witness Joy Anthony positively identified the accused in the identification parade. TsholofeloPetro and Hoosain also indentified the accused in the dock as being one of the assailants. An inference could be drawn which might not exclude the accused, more so, the section above clearly states that a discharge 'may' be granted and not 'must' be granted on application. It is for these reasons that I refused the application.

30] The accused then closed his case, opting not to testify and or lead any evidence in his defence.

31] The State and the defence argued that the contradictions in the witnesses' evidence were material. The State, further argued that these contradictions were such that they created doubt and the benefit thereof should be given to the accused.

32] The State contended that there was a gap in the evidence that they had presented to the court, and this gap rendered their case floored. They could not with certainty conclude that the only inference that could have been drawn from the evidence presented was that, the accused was the person who committed the offences preferred against him

33]Zulman JA in **S v V 2000 (1) SACR 453 (SCA) at 455A-B**,

"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A 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."

34]From the outset the accused placed identity in dispute. His version was simply that he was not present at the tuck shop when the incident took place as he was at Take Two tavern.

35]If I examine all the evidence in totality, in the face of the explanation advanced by the accused, there is no evidence, standing on its own that points directly to the guilt of the accused. Further, even if an inference is to be drawn there from, it cannot be the only inference one could draw, that the accused was one of the assailants on the day in question.

36]Though Tsholofel places the accused in the tuck shop, her dock identification puts a spanner in the works. Throughout her evidence she never stated what the identifying features were of the accused that made her certain that the assailant

was indeed the accused in the dock. This also occurs with Joy Anthony, though he said he recognised the accused by his teeth. When questioned by the defence as to whether the accused was smiling at the identification parade or in court, he then buckled and said that he had made inquiries as of the accused from Dennis.

37]Both Dennis and his grandmother give an account of the utterance of the accused "sonny jy spied". As to when, where and to whom this was said, their versions are strikingly opposite.

38]In conclusion, when the evidence is examined in totality, against the explanation of the accused, it is not sufficiently strong to outweigh the explanation of the accused, as not being reasonably possible, that I can safely reject it. See **S v LIEBENBERG 2005 2 SACR 355 SCA at paragraph 14, Jafta JA** remarked "The acceptance of the prosecution's evidence could not by itself alone, be a sufficient basis for rejecting the alibi evidence....The evidence must have been, when considered in its totality, of the nature that proved the alibi to be false."

39]In the result it cannot be that both versions, that of the State and the accused, can be reasonably possibly true.

40]The accused is therefore entitled to the benefit of the doubt.

In the circumstances the following order is made:

- 1. The accused is accordingly found not guilty on count 1- robbery with aggravating circumstances and count 2- murder and acquitted.**

W HUGHES-MADONDO

ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

(i) costs of such proceedings

On behalf of the STATE: Adv. MOKONO (OFFICE OF THE DPP)
On behalf of the ACCUSED: Adv. VAN TONDER (LEGAL AID OFFICE)