

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-03-23

Not reportable

Case Number: A1117/07

In the matter between:

MOTHOKGANE PHILLEMOM MAKUA

Appellant

and

THE STATE

Respondent

JUDGMENT

SOUTHWOOD J

[1] On 2 February 2006 the appellant was found guilty of murder and malicious damage to property in the Middelburg Circuit Court (Smit J) and on 3 February 2006 the appellant was sentenced to 15 years imprisonment for the two offences which were taken together for purposes of sentence. The appellant unsuccessfully applied for leave to appeal against the convictions. With the leave of the Supreme Court of Appeal the appellant appeals to this court against the convictions.

[2] On appeal the appellant's counsel contends that the state did not prove beyond reasonable doubt that the appellant committed the crimes. The appellant's counsel argues that the single witness who testified that he saw the appellant shoot and kill the deceased was not a credible and reliable witness and that the alleged pointing-out by the appellant of the deceased's body and the burnt out motor vehicle were not sufficient corroboration to justify the convictions.

[3] It is common cause that –

- (1) In September 2004 the state witness, Justice Moloka, the appellant and Freddy Poshiwa, the deceased, were all employed by Great North Transport Company (Great North) at Burgersfort, Moloka and the appellant as bus drivers and the deceased as a supervisor;
- (2) On 23 September 2004 Mr. Thabane Lesese of Great North found that the appellant had not issued tickets properly and was driving the bus without a waybill and that on 29 September 2004 the deceased handed to the appellant a letter informing him, the appellant, of his suspension pending a disciplinary enquiry;
- (3) On 29 September 2004 the appellant was immediately replaced as driver by Moloka and that Moloka also became entitled to the accommodation used by the appellant;

- (4) On 29 September 2004 the deceased drove in Great North's LDV to the appellant's accommodation where the deceased had arranged to meet Moloka at the end of his, Moloka's, shift;
 - (5) On 30 September 2004 the deceased's badly burned body was found in a hole in the ground some 160 km (or 2 hours' drive) from Burgersfort and Great North's burnt out LDV approximately 1 km away, standing in the veldt;
 - (6) On 30 September 2004 the appellant accompanied two members of the SAPS, Sergeant Motswana and Sergeant Morema, who both became state witnesses, to the place where the deceased's body and Great North's LDV were found and that photographs were taken of the appellant next to the deceased's body and Great North's LDV;
 - (7) The post mortem medical examination established that the deceased died as a result of a gunshot wound to the neck.
- [4] Three witnesses testified for the state and the appellant testified in his defence. In brief outline the evidence was as follows: Moloka testified that after the appellant's suspension he, Moloka, drove the appellant's bus until the end of his shift. He met the deceased who had come to collect him in Great North's LDV. The appellant was also present. The

three men got into the LDV and started to drive off when the appellant told the deceased, who was driving, to pull off the road and stop. The three men were all sitting in the cab, the appellant in the left hand passenger seat, the deceased in the right hand seat but behind the steering wheel and Moloka in the middle. A short conversation ensued between the appellant and the deceased which culminated in the appellant shooting the deceased in the head. The appellant pushed the deceased's body across the seat to the left hand passenger seat and got behind the steering wheel. Moloka got onto the back of the LDV and the appellant drove him home. The appellant then drove off in the vehicle with the deceased. Moloka unsuccessfully attempted to telephone the police that night and only succeeded in reporting the murder to them the next day. The two policemen, Sergeants Motswana and Morema, testified that they investigated the murder. They met the appellant at his home and after some discussion he undertook to show them where the deceased's body and Great North's vehicle were. He directed them to a place about 160 km (or 2 hours' drive) away where he pointed out the deceased's body in a hole in the ground and the LDV approximately 1 km away in the veldt. The appellant testified that on 29 September 2004 he went home in a bus driven by Moloka. The deceased was waiting there for Moloka. The deceased and Moloka then got into the LDV and drove off leaving the appellant at his home. He knows nothing about the murder of the deceased. On 30 September 2004 Sergeants Motswana and Morema came to his house, arrested him and took him with them to a place

where the deceased's body was found in a hole in the ground and the LDV was found in the veldt. He did not direct the police to the body and the vehicle. It was not necessary as the police knew where to go. The appellant could not explain why the state witnesses would testify as they did.

- [5] It is trite that a court must take into account all the evidence before convicting or acquitting the accused – see ***S v Van der Meyden* 1999 (1) SACR 447 (W)** at 450a; ***S v Van Aswegen* 2001 (2) SACR 97 (SCA)** para 8.

‘The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possibly true that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored’. See ***S v Van der Meyden supra*** at 450; ***S v Van Aswegen supra*** at 101c-e.

- [6] The court *a quo* found that there was an overwhelming case against the appellant and rejected his evidence. The court did not find it necessary to analyse the evidence of all the witnesses. It clearly relied

on the evidence of Moloka who testified that he saw the appellant shoot the deceased in the head and the evidence of the two policemen that the appellant directed them to the places where the deceased's body and the LDV were found. In the circumstances, such a pointing-out justified a finding that the appellant had murdered the deceased and attempted to destroy the evidence. Only the murderer could know where the deceased's body and the LDV were.

- [7] Although the point was not raised by the appellant's counsel I have some difficulty with the court *a quo*'s reliance on the pointing-out. While the undisputed evidence of Sergeant Motswana was that he warned the appellant of his right to remain silent and the consequences should he say anything, there is no evidence that the policeman warned the appellant of his right to refuse to point anything out and the consequences should he do so and that he had a right to consult a legal practitioner before undertaking a pointing-out. Making a statement and pointing something out are clearly two different acts and a pointing-out may, in effect (as in this case) amount to an extrajudicial admission – see ***S v Sheehama* 1991 (2) SA 860 (A)** at 879H-I. It has been held that a pointing-out in breach of the accused's constitutional rights is inadmissible subject to the discretion of the trial judge to allow the evidence if its exclusion would bring the administration of justice into disrepute – see ***S v Melani en Andere* 1995 (2) SACR 141 (E)** at 152h-153g; ***S v Melani and Others* 1996 (1) SACR 335 (E)** at 339b-351g. Since the matter was not fully argued before this court I am

reluctant to make any final findings on the issue. I shall proceed on the basis that the evidence of the pointing-out of the deceased's body and the motor vehicle by the appellant is inadmissible and decide whether the remaining evidence justifies the conviction, as was argued by the respondent's counsel.

- [8] The appellant's counsel contended, for a number of reasons, that the evidence of Moloka, who was a single witness, was not satisfactory and did not justify the conviction. The argument seemed to depend on the court adopting a compartmentalised approach to the evidence which, as I have already pointed out, is not correct. While Moloka is a single witness regarding the actual shooting it is not a requirement that his evidence be clear and satisfactory in every material respect. In **S v Sauls and Others 1981 (3) SA 172 (A)** at 180E-F the court emphasised that in considering the evidence of a single witness for purposes of section 208 of Act 51 of 1977 there is no rule of thumb test or formula to apply when deciding the credibility of the single witness. The trial judge must weigh the evidence, consider its merits and demerits and, having done so, decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects and contradictions in the testimony, he is satisfied that the truth has been told. The court also pointed out (at 181G-H) that the exercise of caution should not be allowed to displace the exercise of common sense.

[9] Moloka's evidence was straightforward and he did not contradict himself in any material respect. He was also not challenged on the issues raised in the appellant's heads of argument. He was simply not questioned on these issues. While it is true that on the face of it, it is improbable that the appellant would cold-bloodedly murder the deceased in the manner described without there being a heated argument or harsh words exchanged Moloka's version is corroborated by the following evidence:

- (1) The deceased died from a gunshot wound in the neck. This is consistent with Moloka's evidence that the appellant shot the deceased in the head;
- (2) Moloka's unchallenged evidence that before he shot the deceased the appellant said to the deceased (I translate) 'He did not know what was going to happen to the deceased's children when he had finished what he was going to do';
- (3) Sergeant Motswana's unchallenged evidence, elicited by the accused's counsel in cross-examination, that –
 - (i) the appellant said that he had killed a person and wants to go and point out the scene;

- (ii) Sergeants Motswana and Morema asked the mortuary to go to the scene because the appellant 'had already said he has killed that person';

which, in context, clearly referred to the deceased;

- (4) Sergeant Motswana's unchallenged evidence that at the scene where the deceased's body was found the appellant referred to a container (shown in photograph 10 of exhibit C) as the container which he had used to carry the petrol; and
- (5) The appellant's patently untruthful evidence which was correctly rejected by the court *a quo*. It is clear that the appellant testified to a version that was not put to the state witnesses and was clearly adapted as the case progressed.

[10] in my view the appellant was properly convicted and the appeal must be dismissed.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

M.F. LEGODI
JUDGE OF THE HIGH COURT

I agree

M. ISMAIL
ACTING JUDGE OF THE HIGH COURT

CASE NO: A1117/2007

HEARD ON: 18 March 2009

FOR THE APPELLANT: MR. J. VAN ROOYEN

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. F.W. VAN DER MERWE

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 23 March 2009