

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

BONGINKOSI OSBORNE MYENDE APPELLANT

and

THE STATE RESPONDENT

CORAM : VILJOEN, BOTHA, JJA et VIVIER, AJA
HEARD : 21 NOVEMBER 1984
DELIVERED : 30 NOVEMBER 1984

J U D G M E N T

VILJOEN, JA

In the Court a quo the appellant was, on a
charge of having murdered his father, convicted as

2/.....charged
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charged and, no extenuation having been found, was sentenced to death. He was also convicted of the unlawful possession of the fire-arm with which, on the Court's finding, he had killed his father. He was granted leave by the Court a quo to appeal to this Court against his conviction on both counts. The appeal was set down for 5 November 1984. Shortly before the appeal was due to be heard, a Notice of Motion dated 26 October 1984 in terms of s22 of the Supreme Court Act 59 of 1959, was filed praying for an order in the following terms:

- (a) The conviction and sentence of BONGINKOSI OSBORNE MYENDE on a charge of murder and a charge of possession of a firearm without a licence in the Durban and Coast Local Division of the Supreme Court of South Africa under case number 302/83 on the 17th April, 1984, is hereby set aside;

(b) The case is remitted to the Durban and Coast Local Division of the Supreme Court of South Africa:

(c) The Honourable Trial Judge is directed:

(i) to hear and consider evidence by either party relating to the truth or otherwise of the contents of the letter addressed to the applicant and which is attached to the applicant's affidavit as Annexure "A"; and

(ii) thereafter to give judgment anew in this case.

On 5 November 1984, because the State had not had a proper opportunity to consider and to deal with the application, the matter was postponed to 21 November 1984. On this latter date this Court had before it the Notice of Motion referred to above with an affidavit by the applicant (I shall hereinafter

refer to him as the appellant) and a copy of a letter alleged by him to have been written to him and signed by his mother. In answer to the said application there was before us a Notice of Intention to Oppose with, attached to it, a denial on affidavit by the appellant's mother that she had written the letter. Further affidavits, one by a handwriting expert to the effect that the handwriting of the person who wrote the letter was not that of the appellant's mother and another one to the effect that the finger prints on the letter were not the finger prints of the appellant's mother, were filed. There was no replying affidavit. On these papers this Court must now consider the application.

The letter which the appellant says he received from his mother is in the Zulu language, but, for the benefit of this Court, it was translated into English by an official court interpreter employed by the Department of Justice. The address which it contains purports to be the address of the mother, I presume. The translation reads as follows:

"My son,

I did not know that I will eventually accomplish my liking. As I had for a long time wished that you be sentenced like this. I will tell you the whole truth which I did so that you be there, because I know very well that you will not have the chance to answer for yourself, I want that by the time you die you know the whole truth very well, so that your father meets you properly as you were his most loved one. I was nothing when you were present.

I was very glad when there was ill feeling between you (plural) because I even told him to chase you away. What annoyed me about your father was that

he told me that if you came back home he will forgive you as his only son, and that he will buy you a new motor vehicle to indicate that he has forgiven you. I became so angry when I heard that and I realised that all the money will go to you, because he had recently bought you a brandnew car, a Big Six. I thought and decided that it would be better if he be got out of the way, but that you should shoulder the blame so that he no longer does what he wished to do about you.

I succeeded in my wishes because the day in which your father died was the day you came saying you had come to ask for pardon from him. It was then easy. So that it could be seen as if you had done that because you had quarrelled. So I hired people to get rid of him with a gun so in fact you were suspected of the crime. The Magistrate had acquitted you on the first occasion in 1982. I could not rest after your acquittal because I thought you will see (realise) that I had pushed the blame on you. I tried to do everything for you so that you do not see (realise) but my heart is sore because I think that people will know about this disgrace. I took the case up afresh and hired (bribed) witnesses to give false evidence in Court that

you in fact did this. I have at last succeeded. I am now living very happily with my female children because you could see very well that you will have the right to be the head of the home as your father is dead but you have flopped badly my child I am telling you.

I knew very well that you would not agree that we do this killing together because you would not be brave to kill your natural father. No child in his/her sound senses can do that unless you are mad.

I have caused people, the police, even the law to believe that you did this thing because I told them in papers also that you are a bad child, because I want you to die, they must not release you.

Tell me, as you had so many friends, why are they not sorry because you squandered my husband's money with them. They will not help you because they know how bad you are although you will die for something you have no knowledge of. If anyone would assist you he/she would be brave and I can do to him/her what I did to your father.

I will not furnish you the names of the people I

hired to do this because you know them, they are people you are acquainted with, you saw some of them at Durban Supreme Court on the 16th and 17th April, 1984, and you will die hating them. Yet they are also innocent, they are destitute people, they wanted money, you also know my child that money is well received.

What is between me or you will finish in Heaven where nothing will be hidden. My children also know that you are a criminal that is why they do not care for you because they think that you are a lion. Yet they do not know that I am the instigator.

Forgive me when you go to your grandfathers.

I am your mother,

Signed: R MNYENDE"

It appears from the appellant's affidavit that his pro deo counsel handed the original letter to prosecuting counsel who in turn handed it to the police officer or officers who investigated the case

and they in turn sent it to a handwriting expert for further investigation and tests to be carried out by them "in order to establish whether it is in fact my mother's handwriting that appears on the letter." I assume that the decision to hand over the letter to the State prosecutor was taken by defending counsel on his own initiative. Whether the appellant expected or approved the step taken by his counsel does not appear from his affidavit. Of course, he had no alternative but to sign the affidavit which was prepared by pro deo counsel. There is, furthermore, a complete dearth of information surrounding the receipt of this letter. His affidavit, of which his counsel is the author, contains the following two

paragraphs:

"13. It is my respectful submission that the contents of annexure "A" speak for itself and clearly establishes that I am innocent and that my mother and the assassins she hired are the ones to be blamed for my father's death. It is therefore with respect my submission and conviction that should this Honourable Court direct this matter to be referred back to the Durban and Coast Local Division for the leading of further evidence and for this aspect concerning annexure "A" to be properly canvassed and tested, the truth will no doubt eventually emerge.

14. I respectfully submit further that at no stage during the trial did I have any proof whatsoever that my mother might be involved in the killing of my father. It is only well after the trial and when annexure "A" came to hand that I became convinced that my mother was the author of my father's death. The reason why evidence to this effect was not presented at the trial Court is therefore with respect twofold, namely:

11/.... (a) I did

(a) I did not suspect my mother of the murder; and

(b) In any event, even if I had suspected her, I had no evidence at my disposal to prove it."

The mother's affidavit contains the following paragraphs:

"2. On 1st October 1984 on request of the Police I called at Umlazi Police Station where I was shown a letter alleged to have been written by me. This letter is attached to the Applicant's affidavit as 'Annexure A'. I bear no knowledge of the letter and did not write it. I did write a letter to my son in Pretoria Prison but it is not the same letter now in possession of the Police.

3. It can clearly be seen that my surname, MYENDE, is spelt incorrectly where the writer of 'Annexure A' to the Applicant's affidavit has signed the letter on the final page thereof. The writer has spelt the surname 'MNYENDE'."

Captain Erasmus of the South African Police

at Umlazi deposed that on 1 October 1984 he had an interview with the appellant's mother Mrs Roseline Nokwenzani Myende in his office where he obtained from her, without telling her why he required it, a specimen of her handwriting and of her signature. He also procured a set of her palm and finger prints. Both the specimen handwriting and signature and the palm and finger prints were sent for analysis and comparison with the handwriting and signature on the letter alleged by the appellant to have been written by his mother. Warrant Officer Pretorius, attached to the S A Criminal Bureau in Pretoria, an expert examiner of disputed documents, handwriting and typing,

13/.... deposed

deposed as follows:

- "4. Na 'n noukeurige ondersoek en vergelyking het ek tot die bevinding geraak dat die skrif op die brief en die monsterskrif deur twee verskillende persone geskryf is.
5. Ek het ook die genoemde brief behandel om die vingerafdrukke daarop sigbaar te maak. Die vergelyking van die vingerafdrukke is nie deur my gedoen nie."

The comparison of the finger prints was done by Warrant Officer Collier of the South African Police stationed at the Finger Print Office, Durban, who stated the result of his investigation in his affidavit as follows:

- "3. Op 1984-11-08 het ek 'n brief wat geadresseer is aan ene Bonginkosi Myende ontvang.... Daar verskyn vingerafdrukke op die brief. Ek het ook 'n stel geinkte vingerafdrukke met die naam Roseline Myende ontvang.

4. Ek het die vingerafdrukke op die brief vergelyk met die geinkte vingerafdrukke en gevind dat dit nie identies is nie en deur verskillende persone gemaak was."

So much for the allegations in the papers.

The headnote in S v de Jager 1965(2) SA 612(A)

reads as follows:

"The basic requirements for an application for the hearing of evidence on appeal, or the more usual course of setting aside the conviction and sentence and sending the case back for the hearing of further evidence, are: (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial; (b) there should be a prima facie likelihood of the truth of the evidence; and (c) the evidence should be materially relevant to the outcome of the trial. Non-fulfilment of any one of these requirements would ordinarily be fatal to the application."

Counsel are agreed that requirements (a)

and (c) have been met in the present case but

15/....Mr Hutchinson,

Mr Hutchinson, for the State, opposes the application on the ground that the second requirement has not been fulfilled. The corresponding requirement to be complied with in a proper case under s 316 of Act 51 of 1977, is couched in the following terms (see ss 3(a)):

"(a) That further evidence which would presumably be accepted as true, is available."

In a fairly recent judgment in the Cape Provincial Division of the Supreme Court, S v Steyn 1981(4) SA 385, this requirement was fairly exhaustively considered. Whatever the words prima facie or "presumably" may mean, I do not, in the present case, propose to apply the test laid down. I agree with Mr Hutchinson that on the papers, regard being had to the affidavits of the appellant's mother and of the finger print and

handwriting experts, no prima facie case has been made out. However, in view of the special features of this case the members of this Court have decided, without wishing to create a precedent, and in spite of the application, as it stands, failing the test referred to, to grant the application. This is a capital case. Neither the handwriting nor the finger print experts have given reasons for their respective conclusions. The appellant might not have foreseen that his allegation that the letter had been written by his mother would be properly investigated and it may be that when confronted in Court with properly substantiated

expert evidence, he would have no answer. Even so, although the dispute raised on the papers does not, on the face of it, appear to be a real or genuine dispute, we take into consideration that pro deo counsel prepared the application under adverse circumstances. Apparently, as far as we could ascertain, the appellant communicated with counsel by correspondence; counsel had no proper opportunity to consult with the appellant; he did not have the assistance of an attorney; the circumstances under which the disputed letter was received have not been revealed. Although it is difficult to conceive in what respect, if at all, further light other than what appears from the bald assertion made in the appellant's affidavit can be cast on the

matter, there may be more behind the allegation than meets the eye. I must make it clear though that the only issue which the Court a quo will be called upon to decide initially is the authorship of the letter in dispute; only in the event of the Court resolving the issue in favour of the appellant would the effect of such finding on the outcome of the matter become a further issue and such further evidence as may be held to be relevant to the conspiracy alleged would then be receivable.

In view of the special circumstances of this case the application is granted and the following order is made:

- (a) The convictions and sentences of the appellant on a charge of murder and a charge of possession

of a fire-arm without a licence are set aside.

(b) The matter is remitted to the trial Court

(i) to hear evidence by either party relating to the issue as to whether the disputed letter was written by the appellant's mother;

(ii) in the event of the trial Court resolving the issue in favour of the appellant, to hear evidence by either party on the issue of the conspiracy alleged in the said letter, and;

(iii) to consider such evidence, hear argument thereon and give a decision de novo on all the evidence.

JUDGE OF APPEAL

BOTHA, JA)
) - CONCUR
VIVIER, AJA)