

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A232/2008

In the appeal between:

ALBERT B N T MAQHEANE
KHOLISILE J A NTHETHU
SIBONGILE J MAQHEANE
MODUPE MOTAUNG

First Appellant
Second Appellant
Third Appellant
Fourth Appellant

and

THE STATE

Respondent

CORAM:

EBRAHIM, J *et* VAN DER MERWE, J *et*
NXUSANI, AJ

HEARD ON:

11 MAY 2009

JUDGEMENT:

VAN DER MERWE, J

DELIVERED ON:

14 MAY 2009

- [1] After 7am on the morning of 17 November 2005, Mr Robert Peter Robertson (the deceased), was brutally murdered, robbed of a Volkswagen bakkie, electronic ware, tools and, machinery and personal items to the value of approximately R95 000,00, in what was clearly a planned operation.

[2] The four appellants as accused number one, two, three and five respectively, were charged together with one Phallang Mosole, as accused number four, in this court with firstly robbery with aggravating circumstances and secondly murder of the deceased. At the end of the trial Voges AJ convicted the four appellants as charged but found accused number four not guilty. The appellants were each sentenced to 15 years imprisonment for the robbery and to life imprisonment for the murder. With the leave of the trial court the first appellant now appeals only against the sentences whereas the second, third and fourth appellants appeal against both the convictions and sentences. For the sake of convenience the appellants will hereinafter be referred to as in the court *a quo*.

[3] The aforesaid murder and robbery was not disputed and properly proved. It is therefore only necessary in respect of the convictions of accused number two, three and five to refer to evidence presented by the prosecution that could implicate these accused persons in these crimes. The goods found in possession of the accused or handled by them, referred to below, were proved to be the property of

the deceased taken from his possession on 17 November 2005.

- [4] Tello Maqheane ("Tello"), 18 year old son of accused number three, testified that at approximately 11am on 17 November 2005 accused number one and two arrived at the house of accused number three with the Volkswagen bakkie of the deceased. Accused number two was the driver of the bakkie. Accused number one is Tello's uncle, the brother of accused number three. Loaded onto the bakkie were the items taken from the deceased. Accused number one enquired as to the whereabouts of accused number three but accused number three then arrived by bicycle. All four of them then moved to the premises where Nthabiseng Maria Letsie ("Nthabiseng") rented a room. There the goods were offloaded from the bakkie and placed into Nthabiseng's room. Accused number three however stood next to the gate of these premises. Later that day Tello saw the bakkie again at the house of his brother Theboho. At that time the bakkie was without the rails and number plates that it had when he saw it earlier that day.

[5] Nthabiseng testified that on 17 November 2005 at approximately midday she went home with her sister Matsipang Maria Maqheane ("Matsipang"). Matsipang is the wife of accused number three. On arrival at the premises where she stays, they met accused number three at the gate and the bakkie of the deceased driven by accused number two and in which accused number one was a passenger leaving the premises. Inside her room she found the goods belonging to the deceased. As she was told that these goods belonged to accused number one, she went to the house of accused number three to enquire. There accused number three advised her to wait as the owner of the items would probably come to fetch the items. She was not satisfied with the goods in her room as she suspected them of being stolen property. She went to phone the police but the police did not arrive. Back at her room with Matsipang, accused numbers one and two arrived. Accused number one removed a grey leather jacket and a black laptop bag. Accused number two removed a black leather jacket and a firearm. She noticed blood on the shoes of accused number one. As neither

accused number one nor the police arrived, Nthabiseng, still dissatisfied, returned to accused number three to complain about the goods in her house. As a result hereof accused number three and four removed the goods belonging to the deceased from the room of Nthabiseng with a wheel barrow. All this took place on the same date, that is 17 November 2005. Matsipang also testified and materially corroborated the evidence of Ntabiseng.

- [6] Dikeledi Thebogoane is the girlfriend of Theboho, another son of accused number three. She testified that at approximately 11am on 17 November 2005 she saw the bakkie of the deceased at a service station in the area. She saw that the passenger in the bakkie was accused number one but she could not recognise the driver thereof. Between 3 and 4pm she arrived at Theboho's house where she found the bakkie of the deceased at the back of house, at this stage however without the number plates and rails that she saw that morning. She found this suspicious, also because nobody on the premises was able to drive a vehicle. She went to the house of accused number three to enquire. She found nobody there and then went to the

room of Nthabiseng where she found Nthabiseng, Matsipang and accused number three. Accused number three was busy bending number plates and took them with him when he left. As a result of Dikeledi's efforts, the police took possession of the bakkie at Theboho's premises on the evening of 17 November 2005.

[7] Three gentleman of Zimbabwean origin, namely Stanley Morotsa, Moses Mdumburu and Jabulani Nqube, each testified that at the end of November/beginning of December 2005 they bought property belonging to the deceased from accused number three and handed the purchase price for these items to accused number three.

[8] Inspector C J Claassen of the South African Police Services, the investigating officer in the case, testified that since 17 November 2005, as a result of information received, he was looking for accused number three. He was however unable to locate or make contact with accused number three despite visits made and messages left at both the house and workplace of accused number three. Eventually, at about 23h00 on 13 December 2005,

after climbing over a high fence and searching the house, he found accused number three hiding between the base and mattress of his bed in his bedroom. Upon enquiry as to the goods removed by accused number three from the room of Nthabiseng, accused number three took inspector Claassen to the house of accused number four. Accused number four informed him however that the goods were taken to the house of accused number five. Accused number four then took inspector Claassen to the house of accused number five. According to inspector Claassen accused number five admitted that that was his house and that he alone resided there. In the house inspector Claassen found several items belonging to the deceased. Except for a television set, these goods were placed in a sink bath and covered with a blanket. According to this witness accused number five was unable to provide an explanation for the presence of the belongings of the deceased in his house. He denied that accused number five said that that was the house of a person referred to in the record as Deboni and that he took care of Deboni's house in the latter's temporary absence.

[9] Accused number one testified in his defence. He testified that he was employed by the deceased. He said that on the morning of 17 November 2005, whilst he was working with the deceased, accused number two, three and five, as well as a person unknown to him, arrived. Accused number five was also unknown to him. Accused number two carried a firearm and accused number three hit the deceased with a tommy bar at the back of the head or neck as a result of which the deceased fell down and was further assaulted. Accused number one described in detail how the murder and the robbery were perpetrated. He assisted in removing the property of the deceased by loading it onto the deceased's bakkie but said that he did so as a result of having been threatened with a firearm by accused number two. Accused number one testified that the bakkie was then driven to the house of accused number three. Accused number two was the driver of the bakkie and accused number five was on the passenger side, whilst accused number one sat in the middle. At accused number three's house they met Tello. On the instructions of accused number three, Tello got into the bakkie with accused number two, who then drove to Nthabiseng's

place. Accused number one, three, five and the unknown person apparently went on foot to Nthabiseng's place. There the goods were offloaded and placed in Nthabiseng's room. Accused number three then removed the number plates from the bakkie, at Nthabiseng's place. Accused number three sent Tello to call Theboho, who then arrived. Accused number three told Theboho that the bakkie would be left at Theboho's place. All of them then left with the bakkie for Theboho's place. Accused number five, who then had the firearm in his possession, sat in the back of the bakkie. Accused number one was arrested that same evening at approximately 8 or 9 pm.

[10] Accused number two testified that he knew nothing at all about the incident. He was arrested on 22 November 2005. He said that he borrowed the black leather jacket from Theboho approximately two days before his arrest.

[11] Accused number three testified that he works for a crèche and resides in a house on the same premises. On 17 November 2005 he was sent on an errand and on his return with his bicycle, he saw accused number one and

the deceased's bakkie with the goods loaded onto the bakkie. Accused number two was also present. Accused number one said that the bakkie and the goods belonged to his employer. He enquired whether he could leave the goods at accused number three's place. He said that they were going back to the farm but would pick up the goods on the following day on their way to the place where they are going to work outside of the city. Accused number three then said that he did not have room for the goods. Mention was then made of Nthabiseng. Tello was in possession of a key to Nthabiseng's room. The goods were then taken to Nthabiseng's place of residence and placed in her room by accused number one and two in the presence of accused number three. Accused number one and two then drove off with the bakkie. Just at that moment Nthabiseng and Mapitsang arrived. Accused number three then informed Nthabiseng about the goods and that they would be picked up on the following day by accused number one. Later that day however Nthabiseng phoned accused number three and told him that her landlord was dissatisfied about the presence of the goods. As a result accused number three removed the goods with

a wheelbarrow to accused number four's house. However on the same day he also received a message from accused number one that he should sell the items that he did sell to the Zimbabweans. He handed the proceeds of the sale of these goods to the messenger.

[12] Inspector Claassen was then called as a defence witness for accused number three. He testified that in the statement made by accused number one shortly after his arrest, he did not implicate accused number three (he also did not implicate accused number five). Accused number four closed his case without testifying.

[13] Accused number five testified that he was arrested by inspector Claassen early on the morning of 14 December 2005 at the house of Deboni. Accused number five testified that he stayed at the house of Deboni at the latter's request in order to look after the place whilst Deboni was in Lesotho, where they both hail from. He testified that he told this to inspector Claassen. The police then searched the house and found items stolen from the deceased. These items were however not hidden in any

way. He testified that he had no knowledge of the crimes in question.

[14] The court *a quo* accepted the evidence presented by the prosecution referred to above. The court *a quo* recognised the need to consider the evidence of accused number one with caution and concluded, rightly so in my view, that the evidence of accused number one implicating his co-accused, can be accepted where it was corroborated. The trial court rejected the evidence of accused number two, three and five.

[15] Save for the position of accused number five, which will be dealt with below, there is no basis for interfering with these findings. The evidence against accused number two is so overwhelming that his denial thereof cannot be reasonably possibly true. I agree with the trial court that the evidence of accused number three is riddled with improbabilities. I point only to the following. It is common cause that accused number three actively participated in the handling of the stolen goods from the time that the bakkie arrived at his house during the morning of 17 November 2005.

Accused number three participated in the arrangements to take the goods to Nthabiseng's residence, thereafter he himself moved the goods with a wheelbarrow to accused number four and he sold three of these items, consisting of machinery. His evidence however was that he was told that these goods belonged to the employer of accused number one and would be fetched by accused number one on the following day. On his evidence, on the probabilities, there was no need to move the goods from accused number three's place of work and residence to Nthabiseng's place of residence, without her permission or knowledge and where that residence consisted of only one rented room. Even more improbable on the version of accused number three is that thereafter on the same day the machinery would be sold and the goods moved by a wheelbarrow to the place of residence of accused number four. Most damning, however, is the evidence against accused number three by his own brother, accused number one, for which there is no explanation other than that it is the truth. In the circumstances the fact that accused number one did not initially implicate accused number three pales into insignificance.

[16] The evidence against accused number five consists of that of accused number one and of inspector Claassen. As mentioned already, the evidence of accused number one implicating accused number five must be viewed with caution. It will be remembered that in his evidence accused number one placed accused number five not only at the scene of the crime but also at the house of accused number three and the place of residence of Nthabiseng in the presence or view of the aforesaid state witnesses. None of these witnesses however testified that accused number five was either at the house of accused number three or at the place of residence of Nthabiseng. In my judgment this is cause for grave concern and doubt in respect of the veracity of the evidence of accused number one against accused number five.

[17] That leaves the evidence of Inspector Claassen that was disputed by accused number five. The question is whether the court *a quo* was justified in rejecting the evidence of accused number five as false beyond reasonable doubt. In

its judgment the trial court said only the following in respect of the credibility of accused number five:

“Beskuldigde 5 het ‘n power indruk as getuie gemaak. Hy was ontwykend in sy beantwoording van vrae, het sy instruksies aan sy regsverteenwoordiger weerspreek ten opsigte van die goed in die sinkbad en het homself weerspreek ten aansien van wie se huis dit was waarin hy en die gesteelde goed aangetref is. Sy weergawe dat hy bloot die huis vir Deboni vir een of twee nagte sou oppas kom onwaarskynlik voor. Beskuldigde 1 sê dat beskuldigde 5 en Deboni by die pleging van die misdade betrokke was. Beskuldigde 5 getuig dat Deboni sy swaer is.”

[18] In my judgment none of these aspects justify a conclusion that the evidence of accused number five may not be reasonably possibly true. It was quite incorrect to conclude that accused number five contradicted instructions given to his legal representative, in view of the following passage of the record:

“U instruksies aan my was dat die goed in ‘n sinkbad was met ‘n kombers daaroor. Hoe verduidelik u dit? --- Nee, ek het nooit so instruksies gegee aan u. Ek het nie so gesê dat hulle

was in die sinkbad nie. U het nie vir my mooi verstaan nie.

Die goedere wat daar in die sinkbad gewees het, dit was vuil klere van Deboni.

Edele, ek wil net nog op rekord plaas dat ons wel gebruik gemaak het van 'n tolk. So dit is moontlik dat daar 'n misverstand kon ingesluip het, maar ek sal dit daar laat.”

The statement that accused number five was an evasive witness, is in my judgment not born out by a reading of the record. It is true that in the beginning of his evidence in chief accused number five said that the police arrived at his house during the night of 13 and 14 December 2005. It should however have been clear that this was simply a mistake. The version of accused number five that he was found at the house of Deboni and why, was clearly put to inspector Claassen and was put right in the very next sentence of the evidence in chief of accused number five. I do not find it at all improbable that accused number five looked after the house of Deboni in the manner that he testified. Accused number one did not testify that Deboni was involved in the commission of these crimes and in any event, even if the statement was correct, the mere fact that Deboni was the brother-in-law of accused number five,

could not count against him at all. In my judgment the trial court was clearly wrong in rejecting the evidence of accused number five. Counsel for the respondent therefore correctly conceded that the evidence of accused number five may reasonably possibly be true and that he should have been acquitted on both charges.

[19] Regarding the sentences imposed in respect of accused numbers one, two and three, the question is whether the court *a quo* erred in finding that there were no substantial and compelling circumstances that justified departure from the sentence of 15 years imprisonment prescribed in respect of count 1 and life imprisonment in respect of count 2. Counsel for accused numbers one, two and three each conceded that they could not put forward any such substantial and compelling circumstances. These concessions were made fairly and clearly correctly.

[20] The following order is issued:

1. The appeals of the first appellant, second appellant and third appellant are dismissed.

2. The appeal of the fourth appellant (accused number five in the court *a quo*) succeeds and his convictions and sentences are set aside.

C.H.G. VAN DER MERWE, J

I concur.

S. EBRAHIM, J

I concur.

J. NXUSANI, AJ

On behalf of the first appellant: Adv. K. Vorster
Instructed by:
Bloemfontein Justice Centre
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On behalf of the second

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On behalf of the fourth
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On behalf of the respondent:

Adv. S. Chalale
Instructed by:
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