

Reportable:
YES/NO

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YES/NO
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YES/NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION**

**Case Number: KS 26/04
Heard: 15/02/2007**

Delivered: 30/03/2007

In the matter between:

FISAS MAGOULAANE

First Appellant

THEMBA NTSHANGANA

Second Appellant

and

THE STATE

Respondent

Coram: Kgomo JP *et* Bertelsmann J *et* Makhafola AJ

JUDGMENT

Bertelsmann J

1. The two appellants were accused in the Court *a quo* of murder, defeating the ends of justice and the possession of an unlicensed firearm and ammunition. They were charged together with two other accused, who were acquitted of all charges. The appellants were respectively accused number two and accused number three in the Court *a quo*.

2. The principal charge of murder was based upon the allegation that the accused killed one John Burger in Kimberley during the night of the 11th to the 12th November 2003. The alleged motive for the murder was a conspiracy to eliminate the deceased as a witness against the appellants, who were charged in another trial in Pretoria with motor vehicle theft. This fact constituted the factual basis for the second charge. The third and fourth charges related to the unlawful possession of an unlicensed firearm and ammunition that could be fired from it.
3. The appellants were convicted of the first two charges and acquitted of the third and fourth charges. Each one of them was sentenced to life imprisonment on charge 1 and to five years imprisonment on the second charge. The sentences must be served concurrently as a matter of law.

Both appeal against the conviction and sentence on both counts.

THE FACTS

4. The deceased was a witness in criminal trial in which the two appellants were charged with as many as 58 charges of motor vehicle theft. These charges were particularly grave because the third accused was a police officer attached to the local motor vehicle theft branch when the murder was committed. The deceased was the key witness against the appellants. The charges of motor vehicle theft had to be withdrawn after his death because no further evidence was available to implicate the appellants.
5. The court *a quo* found, in an excellently crafted and closely reasoned judgment, that the appellants had conspired to kill the

deceased. The State proved beyond a reasonable doubt that the appellants had enlisted the help of the other two accused and arranged the hit man who fired the fatal shots. The motive for the contract murder was held to be the elimination of the victim as the critical witness in the motor vehicle theft trial.

6. Although it was not proved that either of the appellants fired the fatal shot, both were involved in the planning of the killing. The second appellant was in the company of the first appellant and the State's principal witness, an accomplice by the name of Johannes Sikhosana, commonly known as Jack, before the murder was committed. It is common cause that a .38 revolver was inspected at that juncture. The second appellant described it as the best weapon for their purpose as it would not leave cartridges behind.
7. According to the evidence of the accomplice, the second appellant referred to the deceased as the person who was to be eliminated with that revolver. He had to be murdered to prevent him from testifying. This was openly discussed between the appellants and the accomplice Jack.
8. The first appellant came to Kimberley for the night during which the fatal shooting took place. It is common cause that he made several calls from his cell phone to that of the second appellant shortly before the murder was committed. It is also common cause that he phoned the second appellant in the early hours of the 12th November 2003 and told him that "*they had taken the old man out*" ("*hulle het die ou man weggevat*").
9. According to the second appellant's own evidence, his reaction to this news was "*I told him that I had heard nothing yet, that I would*

*have to read the newspapers.” (“Ek het vir hom gesê dat ek nog niks gehoor het nie, ek sal maar die koerante lees.”). He then asked the first accused whether anyone had “... seen them.” Correctly, the Court *a quo* held that this answer was clearly one that could only have been given by someone involved in the commission of the crime, particularly in the light of the fact that the second appellant was a police officer.*

The appellants were consequently convicted as charged on the first two counts.

THE APPEAL ON THE FACTS

10. The appellants attacked the trial Court’s finding on the facts on the grounds that the evidence of the accomplice Jack Sikhosana should not have been accepted.
11. This argument cannot be sustained and was advanced rather hesitantly by counsel for the appellants. The learned Judge *a quo* thoroughly analyzed the evidence of all witnesses and meticulously dealt with all positive and negative aspects thereof. It would be tedious and quite uncalled for to repeat the logical argument that led the trial Court to the inevitable finding that the evidence established the guilt of the appellants beyond reasonable doubt. We can do no better than endorse the result. The appeal against the findings of fact must be dismissed.

THE ADMISSIBLE EVIDENCE

12. The appellants object against the admission of the evidence of three State witnesses, Stanley Paul Ingwane, Petrus Massango and Johannes (Jack) Sikhosana, on the grounds that their evidence was obtained in conflict with the provisions of section 35 of the

Constitution, 108 of 1996. It is the appellants' case that the police were made aware of the existence of these witnesses through a statement that the second appellant made to the investigating officers after his arrest.

13. This statement is said to have been obtained in conflict with the second appellant's fundamental rights as enshrined in section 35. The evidence obtained through the information contained therein was tainted to such an extent, so the argument goes, that it should not have been admitted against either of the appellants.
14. The factual background against which this argument is advanced, is the following:
 - 14.1 Immediately after the murder, the finger of suspicion pointed in the direction of the appellants. Their names were supplied to the police by the deceased's widow.
 - 14.2 The second appellant was arrested in the early hours of the 16th November 2003;
 - 14.3 He was arrested by three former colleagues, captain Lourens, inspector Luis and inspector Laubscher;
 - 14.4 He was interrogated at the police offices and then made a statement that sought to place the blame largely on his co-appellant and to exculpate himself;
 - 14.5 This statement was admittedly made after captain Lourens had emphasized to the second appellant that only a court could indemnify him in terms of section 204 of the Criminal procedure Act 51 of 1977;
 - 14.6 The statement was found, upon closer analysis by the investigating officers, to have presented a selective version of the truth that was designed to mislead the police and the prosecution rather than to assist the

investigation by revealing incriminating facts that would assist in apprehending and convicting the other perpetrators involved in the commission of the murder;

14.7 Other persons involved in the crime were traced as a result of a cell phone number mentioned in the second appellant's statement;

14.8 These persons included the three State witnesses referred to above;

14.9 One of these, Jack Sikhosana, made a clean breast of it and was called as a witness in terms of section 204. His evidence eventually led to the appellants' prosecution and conviction;

14.10 After the prosecution became aware of the unsatisfactory nature of the second appellant's statement, it decided to prosecute the second appellant rather than to use him as a witness to whom the benefits of section 204 would be extended if he, in the opinion of the trial Court, answered all questions "*frankly and honestly*" even though they would incriminate him;

14.11 The State tendered the second appellant's statement in evidence during the trial;

14.12 The trial court held the statement to be admissible in spite of objections by the defence.

15. The second appellant objected against the admission of his statement on the grounds that:

151His fundamental rights to a fair trial were infringed by the failure of the investigating officers to warn him that the benefit of being called as an accomplice witness in terms of section 204 would be withdrawn if his statement proved to be unsatisfactory or mendacious;

152He was misled by the police to make a statement by the assurance that he would be called as an accomplice witness if he but made a statement, regardless of its content;

153The State was *mala fide* in prosecuting him after he made a statement;

154His statement led the police to the three State witnesses whose evidence ensured his conviction, in the light of which it was a violation of his right to a fair trial not to keep the promise to use him as a State witness.

16. The trial Court held, as a matter of proven fact, that the police had duly warned the second appellant of the consequences if his statement were to be found to be misleading or substantially untrue. There is ample evidence to support this finding.
17. In addition, the trial Court correctly emphasized that the second appellant is no ordinary member of the public, but a professional police officer who had 24 years service at the time of his arrest. He had arrested persons himself during the course of his career and had informed them of their fundamental rights during such arrests.
18. The trial Court was therefore of the view that the appellant was aware of his fundamental rights even if nothing had been said to him upon his arrest or before he made the statement concerned. Consequently, the second appellant's fundamental rights were not infringed when he made the statement, regardless whether "his rights were read to him" or not. The Court *a quo's* judgment in the trial within a trial is reported as *S v August* 2005 (2) All SA 605 (NC).
19. This approach is indubitably correct. Section 35 (1) (a) and (b) of

the Constitution guarantee the right:

“(a) to remain silent;

(b) to be informed promptly-

i) of the right to remain silent; and

(ii) of the consequences of not remaining silent...”

20. The fundamental right protected by the Bill of Rights is not the right to be informed as such, but the accused's right to know that he or she may remain silent, will be presumed to be innocent, has the right not to co-operate with the police investigators and is aware of the consequences of a decision not to remain silent.

21. If the arrested person has, by virtue of his office or profession acquired this knowledge prior to and entirely independent of her or his arrest, the failure by the police officers to warn him or her of his rights does not constitute an infringement of his or her fundamental right; and the failure to inform the arrestee of matters that are well known to her or him cannot render a subsequent trial unfair as the arrestee was not prejudiced thereby: See generally, *S v Shaba en 'n ander* 1998 (1) SACR 16 (T).

The attack on the admissibility of the second appellant's statement on this ground must therefore fail.

22. The suggestion that the investigating officers promised the second appellant to call him as a witness in terms of section 204 of the Criminal Procedure Act regardless of the truth of contents of the statement he would make, needs only be made to be rejected as nonsensical.

23. The whole purpose of section 204 of the Criminal Procedure Act is to create a mechanism in terms of which an accomplice may be

encouraged to turn “King’s evidence”. Much as this practice may leave the purist uncomfortable because of the moral implications of allowing a criminal to go free, crime can often not be successfully prosecuted without the stratagem of persuading an accomplice to sell his fellows down the river.

24. In investigating offences and exercising a discretion whether or not a particular suspect should be offered the opportunity to escape prosecution on specified charges, the prosecution exercises a discretion that is only limited by considerations of fairness once binding promises have been made to a witness who subsequently incriminates herself or himself on the strength of that promise in a statement to the police: see: *S v Pillay and others* 2004 (2) SACR 419 SCA at 427c-d; *S v Coetzee* 1990 (2) SACR 534 (A) at 541 c-d.
25. In principle, the prosecution, which is independent in the exercise of its functions, may decide to withdraw the offer of being an accomplice witness and prosecute the offender first considered as a witness. This is particularly so in cases where the intended accomplice witness makes an untruthful statement, see: *Wilson v Director of Public Prosecutions* [2002] 1 All SA 73 (NC).
26. The prosecution is clearly entitled, at the very least, to expect an accomplice witness to tell the full truth to the investigators, and nothing but the truth. Calling a dishonest witness in a matter as important as this may result in the course of justice being frustrated and may enable the accomplice witness to ensure that his fellow criminals get off scot-free.

Once it was clear that the second appellant was undeserving

of the trust the prosecution was prepared to put in him, the decision to prosecute him was the only justifiable one.

27. The second appellant claimed, as a last resort, that his statement to the police was the truth. That claim is as false as the statement itself and was correctly rejected by the trial Court. The second appellant has only himself to blame for the consequences of his actions. There can be no suggestion that the trial was unfair or that the evidence discovered as a result of the cell phone number disclosed by him in his statement was incorrectly admitted.

The appeal against the convictions is dismissed.

28. The appeal against the sentence was all but abandoned – and rightly so. There can be no doubt that there are very aggravating features in this case – the murder, executed with careful deliberation and advance planning, was also an assault upon the criminal justice system itself, perpetrated by conspirators that included in their number one who had sworn to uphold and defend it. The appeal against the sentence is dismissed.
29. It remains only to observe that the second appellant motivated the need to murder the victim on the basis that *“The old man will send us to prison”*. (*“Die ou man gaan ons tronk toe vat”*). The old man did – in a tragically different way than the appellants had feared.

E BERTELSMANN

Judge of the High Court

Reportable: YES/NO

I concur

F D KGOMO

Judge President

(Northern Cape Division)

I concur

K MAKHAFOLA

Acting Judge

(Northern Cape Division)

On Behalf of the First Appellant:	Adv. T Fourie (Legal Aid Board)
On Behalf of the Second Applicant:	Adv. B. Segone (Legal Aid Board)
On Behalf of the Respondent:	Adv. A. Van Heerden (DPP)