17/89

Case No. 319/88

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KHETHOWAKHE MTHEMBENI NGUBANI ..... First Appellant

GABHU PHILEMON SIGUBUDU ..... Second Appellant

and

THE STATE ..... Respondent

Coram: JOUBERT, MILNE JJA et F. H. GROSSKOPF AJA

Heard:	**Delivered:**
2 March 1989.	22 March 1989.

J U D G M E N T

F.H. GROSSKOPF AJA:

The first appellant was convicted of murder and of attempted murder. The court a quo found no extenuating circumstances in respect of the murder count and imposed the death penalty. The first appellant was further sentenced to eight years' imprisonment on the count of attempted murder.

The second appellant was also convicted of murder.In his case as well the court a quo found no extenuating circumstances and imposed the death penalty.

The court a quo granted both appellants leave to appeal against their respective convictions and the sentences which were imposed on them.

The state case was that the second appellant had hired the first appellant to kill the deceased. The deceased was the local chief in the Nqutu district. There was

evidence of a personal feud between the second appellant and the deceased which culminated in the death of the deceased. The background evidence was that the second appellant had been allocated a site for his kraal by the deceased, but that the second appellant later moved from that site to another site without the authorisation of the deceased. The deceased thereupon laid a complaint with the local magistrate and the magistrate warned the second appellant not to get involved in any further disputes with the deceased. The deceased thereafter instructed the second appellant to put up his kraal at another site, but the second appellant refused to comply with the deceased's instruction.

It was soon thereafter that the deceased was killed. According to the report of the district surgeon who performed the post-mortem examination the cause of death was a bullet wound which penetrated the deceased's left lung.

The deceased's wife was the complainant in the count which related to the attempted murder. Her evidence

was that on Saturday 28 March 1987 the deceased was driving his motor vehicle to Nqutu. She was a passenger in the car. While the deceased was driving the car along a dirt road the complainant noticed two persons, one on either side of the road. They were carrying firearms. The complainant also saw a large stone in the middle of the road. Shots were fired at the vehicle and the vehicle overturned. The deceased managed to get out of the car, but the complainant was still inside the car when the two armed persons approached the vehicle. The complainant saw them aiming at her. The one was armed with a long gun and the other one with a short gun. They were no more than a few paces away when they both fired shots at her. The complainant was struck by a bullet in the right shoulder and by another bullet in her waist. She could not see the faces of her assailants as they were wearing hats pulled down over their faces.

The state called two further witnesses, one Mngadi and one Khumalo. Each of these witnesses implicated both

appellants in certain respects. The court a quo warned both these witnesses as accomplices in terms of the provisions of section 204 of Act 51 of 1977.

According to the evidence of Mngadi the second appellant approached him one Sunday shortly before the deceased was killed. The second appellant requested Mngadi to lend him his firearm. Mngadi was reluctant to do so, but the second appellant threatened to report Mngadi's unlawful possession of a firearm to the police. Mngadi said that he was scared that the second appellant might kill him, and he therefore decided to lend him the firearm. According to Mngadi the second appellant told him that he wanted the firearm to kill the chief because the chief had asked the second appellant to leave the chief's area.

Mngadi's evidence was that the second appellant further requested him to take the firearm to the induna, oneMsitheni Mlangeni, where Mngadi would meet a stranger

by the name of Ngubani. Mngadi went to Mlangeni's kraal the following Friday taking his firearm, a revolver, and some twenty cartridges along. When he arrived at Mlangeni's kraal Mngadi indeed met a person called Ngubani. This Ngubani happened to be the first appellant. Mlangeni took possession of Mngadi's revolver and handed it to the first appellant. The first appellant inspected the revolver and ammunition and expressed the view that some of the rounds of ammunition were rusted and could, therefore, no longer be used.

Khumalo's evidence was that the second appellant came to visit him at his kraal after they had attended a meeting of the tribal court at the deceased's kraal. The second appellant asked Khumalo to lend him his firearm. The second appellant alleged that he required the firearm because he was being attacked by persons who had been instigated by the deceased to do so. Khumalo at first refused to part with his firearm, a rifle, but the second appellant threatened to report Khumalo to the police for the unlawful possession of

a firearm. Khumalo later discussed the problem with Mngadi and then decided to take his rifle to Mlangeni's kraal as the second appellant had requested him to do.

Mngadi accompanied Khumalo when Khumalo took his rifle to Mlangeni's kraal. The first appellant happened to be at the kraal of Mlangeni on this occasion as well and he was present when Khumalo handed his rifle to Mlangeni.

The deceased was killed soon after these firearms had been made available to the first appellant. After the deceased had been killed Mlangeni asked Mngadi to come and fetch the firearms at his kraal. Mngadi removed the firearms and took them to the kraal of his son-in-law, one Zulu, where the firearms were concealed in the veld.

Mr Leathern , who appeared for both appellants on appeal, submitted that Mngadi was a single witness as far as the alleged conversation between Mngadi and the second appellant was concerned and that Mngadi's evidence, therefore, had to be approached with caution. The same

submission was made with regard to the alleged conversation between Khumalo and the second appellant. It was further submitted that Mngadi was an inconsistent and evasive witness and that he was inclined to adapt his evidence. Khumalo was criticised for contradicting himself and Mngadi in certain respects.

The court a quo considered the discrepancies between the evidence of Mngadi and Khumalo and was conscious of the other unsatisfactory features in their evidence. The court a quo dealt with their evidence as that of accomplices, warning itself of the dangers implicit in the too ready acceptance of such evidence. The court a quo treated the evidence of Mngadi and Khumalo with caution, yet found that they both gave their evidence well. Mngadi's demeanour was found to be adequate, while Khumalo's demeanour was described by the court a quo as positively good. In the end both Mngadi and Khumalo were discharged from prosecution in terms of section 204 of Act 51 of 1977.

Neither the first appellant nor the second appellant testified on the merits of the case and the evidence of Mngadi and Khumalo was left unanswered.

In my judgment there is no reason for this court to interfere with the credibility findings of the court **a quo** in respect of the witnesses Mngadi and Khumalo.

The firearms which were concealed at Zulu's kraal were subsequently pointed out to the police. The one firearm was a .22 rifle and the other one a .357 magnum revolver. An expended bullet which was recovered by the police on the scene of the crime was examined by an expert in ballistics and he established that that bullet had been fired by the .22 rifle which was recovered by the police at Zulu's kraal. It appears from all the evidence that that was indeed the same .22 rifle which the witness Khumalo had taken to Mlangeni's kraal at the request of the second appellant and which had been handed over to Mlangeni in the presence of the first appellant.

The court a quo found with regard to the first appellant that he had received Mngadi's firearm and that he had been present when Khumalo's rifle, which was later used in the attack, had been handed over to Mlangeni.

In convicting the first appellant the court a quo further relied on certain admissions made by the first appellant on 25 May 1987 when he was required to plead before the magistrate of Ngutu in terms of section 119 of act 51 of 1977.

Mr Leathern submitted that the court a quo erred in relying on the first appellant's admissions at the section 119 proceedings inasmuch as the first appellant's plea of guilty in the magistrate's court was induced by assaults and threats of violence on the part of the investigating officer, warrant officer Ngcobo, and other members of the police force, and that the admissions were therefore not freely and voluntarily made. Mr. Leathern pointed out that the first appellant was actually recorded to have said to the presiding

magistrate at the section 119 proceedings that he was being"forced" to answer the questions.

The record of the section 119 proceedings, which was duly received by the court **a quo**, shows that the presiding magistrate explained the nature of those proceedings to the first appellant and his co-accused. The first appellant then pleaded guilty to the charge of murder. The presiding magistrate thereupon proceeded to ask the first appellant questions with regard to the murder count, but the first appellant's response was that he was not feeling well. The following further questions and answers were then recorded by the magistrate:

"Q. What is wrong?
A. I have a sore throat.
Q, But you are able to talk?
A. I am unable to talk.
Q. Since when have you had sore throat?
A. Day before yesterday
Q You have met any treatment?

A. No.

Q. This is not going to be long.

A. I want to be free.

Q. The questions will not be long.

A. I am not prepared - I am presently forced to answer these questions.

Q. Did you kill the deceased, Mboniseni Gezindala Mazibuko?
The accused states that he is not prepared to answer the questions."

It appears to me to be plain from the context that the only complaint of the first appellant was that he was being forced to answer questions while he was allegedly unable to speak as a result of a sore throat. His allegation that he was being "forced" seems, in any event, to have been an overstatement. The use of the word "presently" is also inconsistent with any suggestion that the first appellant was referring to some prior coercion on the part of the police.

When the first appellant stated that he was not prepared to answer the magistrate's questions the prosecutor

asked for the matter to stand down in order that the first appellant could be examined by a medical doctor. The proceedings resumed after a short adjournment and a medical certificate was handed in. At that stage of the proceedings the first appellant intimated that his throat was still sore, but that he would try to speak. Thereupon, and in response to further questions by the magistrate, the first appellant admitted that he had killed the deceased by shooting him with a rifle. The first appellant said that he had been hired by the second appellant to kill the deceased and that he had done so for financial consideration.

Thereafter, and when the second count relating to the attempted murder was put to the first appellant and his co-accused, the first appellant pleaded not guilty to that count.

The first appellant gave no evidence other than at the trial-within-a-trial when the court a quo considered the admissibility of a confession allegedly made by the first

appellant on 18 May 1987 to another magistrate. In the course of his evidence at the trial-within-a-trial the first appellant alleged that after his arrest on 13 May 1987 near Germiston he had been assaulted on a number of occasions the investigating officer, warrant officer Ngcobo, and other members of the police force. This evidence was disputed by those members of the police force who had allegedly assaulted the first appellant. The court a quo ruled that the first appellant's confession should not be admitted in evidence, but for reasons other than the alleged assaults and threats by members of the police force. The court a quo actually found the first appellant to be a most unsatisfactory witness in both manner and the substance of his evidence. Warrant officer Ngcobo and sergeant Dhlame, on the other hand, were found to be honest witnesses who gave what appeared to the court a quo to be an honest recollection of precisely what had happened.

In my judgment the court a quo was fully justified

in rejecting the first appellant's evidence that he was assaulted, threatened or unduly influenced to plead guilty on 25 May 1987 at the section 119 proceedings. The first appellant testified that he was afraid when he appeared in the magistrate's court on 25 May 1987 because Ngcobo was present in court at the time. His evidence was that Ngcobo actually escorted him and his co-accused into the dock and then sat on a chair behind them. That was a deliberate lie on the part of the first appellant. The magistrate testified that he had requested the investigating officer and all other state witnesses to leave the court. The magistrate was quite positive that the investigating officer had not been present in court at the time of the section 119 proceedings. Ngcobo confirmed in the course of his evidence that the presiding magistrate had instructed him to leave the court before the proceedings started.

The first appellant conceded that Ngcobo did not tell him how to plead in the magistrate's court, but he

alleged that Ngcobo had previously told him what to say. The first appellant further testified that Ngcobo never informed him that there was a further charge against him. According to the first appellant he had received no instructions from Ngcobo with regard to the chief's wife. Immediately thereafter, however, the first appellant alleged that he must have pleaded guilty to the other charge because he had been told what to say in that regard. It was pointed out to the first appellant that he actually pleaded not guilty to the other charge. The first appellant then once again changed his evidence and said that Ngcobo never mentioned the other charge, but referred only to the chief. The first appellant conceded that when the second count was put to him in the magistrate's court he gave his own explanation. What he did tell the magistrate with reference to count 2 was the following:

"I did not see how the female got hurt. I just

wanted to shoot the man who was in the vehicle."

The first appellant later added that the woman was in the company of the deceased, but that he did not foresee the possibility of a bullet hitting her. In the light of the evidence of the complainant this exculpatory statement of the first appellant should be rejected. It was in any event not repeated by him in evidence.

There was only the first appellant's unreliable evidence that he was assaulted, threatened and unduly influenced to plead guilty to the murder charge at the section 119 proceedings. Those allegations were disputed by witnesses who were found to be reliable witnesses. In my judgment the court a quo properly allowed and considered the first appellant's admission of guilt at the section 119 proceedings as part of the evidence against him.

I have already referred to the other evidence which implicated the first appellant in the commission of the crime of murder. In my judgment the first appellant's appeal

against his conviction on the murder count cannot succeed.

The first appellant through his own admissions placed himself on the scene of the crime. In view of the uncontradicted evidence of the complainant the first appellant's appeal against his conviction of attempted murder should in my judgment also be dismissed.

The court a quo found with regard to the second appellant that he had arranged for the one gun to go to the first appellant and for the other to be delivered to Mlangeni. The second appellant in fact told Mngadi that he wanted Mngadi's gun to kill the chief. It has been established that at least the .22 rifle was used during the attack on the deceased and his wife. The court a quo concluded that the second appellant's association with the first appellant was clearly established. The second appellant gave no evidence at the trial to deny the evidence of Mngadi and Khumalo, or to give some innocent explanation for his conduct. The second appellant had a motive to kill

the deceased and on all the evidence the second appellant was indeed the prime mover behind the murder. The only reasonable inference from all the evidence is that there was a prior agreement between the second appellant and the first appellant to kill the deceased. The second appellant's appeal against his conviction of murder cannot, therefore, succeed.

It was submitted on behalf of the first appellant that the court a quo misdirected itself in finding that the alleged financial need of the first appellant and his alleged fear of the second appellant did not serve to constitute extenuation. Counsel submitted that the first appellant had been unemployed for a number of years as a result of bad health and that he had experienced financial need as a result of such unemployment. It was further submitted that the second appellant was a quarrelsome person who had a violent temper and that the first appellant may well have been influenced to act out of fear for the second appeallant.

My first difficulty with these submissions is that there is no factual basis for coming to the conclusion that the first appellant killed the deceased because he was in financial need or because he was scared of the second appellant. The alleged financial need of the first appellant cannot, in any event, in the circumstances of the present case be regarded as a factor reducing the moral blameworthiness of the first appellant. On the contrary, I agree with the observation of the learned trial judge that the first appellant "committed this crime for the basest of motives - money".

The extenuating circumstances on which the second appellant relied, related to the alleged unlawful conduct on the part of the deceased in ordering the second appellant to move his kraal. It was submitted that the deceased thereby made serious inroads upon the second appellant's basic rights to set up a home for his family. However, it appears from the evidence of the deceased's brother, Mazibuko, that the

deceased had been acting within his rights and that it was actually the second appellant who was disobeying the lawful orders of the chief. Such unlawful conduct on the part of the second appellant should rather be regarded as aggravating than as extenuating.

In my judgment there are no grounds for interfering with the trial court's finding that there existed no extenuating circumstances in respect of both appellants.

The appeals of both appellants against their convictions and sentences are accordingly dismissed.

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F.H. GROSSKOPF

Acting Judge of Appeal.

JOUBERT, JA

MILNE, JA Concur.