

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MBOKELI STUNKIE MAVELA Appellant

AND

THE STATE Respondent

Coram: E.M. GROSSKOPF, STEYN et EKSTEEN, JJ.A.

Heard: 7 May 1990

Delivered: 30 May 1990

J U D G M E N T

EKSTEEN, J.A. :

During 1986 the deceased, one Petrus Jacobus Fourie, was employed in Port Elizabeth by a construction firm called Clifford and Harris. Early on the morning of 7 July 1986 Fourie, acting in the course of his duty, set out from the firm's premises in a van belonging to Clifford and Harris, and bearing its logo on the door. He was accompanied by one Jacobs who describes himself as "the security". On the back of the van were some 9 or 10 labourers with their equipment. They proceeded to the township of Kwazakhele where they were to construct a manhole in one of the streets. They appear to have arrived at their destination some time after 7 o'clock.

The labourers got off the van and unloaded their tools

and equipment. Fourie and Jacobs also got out, and

Fourie went to show them where the manhole was to be

constructed. Having given them their instructions

Fourie returned to the van intending to go and fetch

the bricks and other material needed for building the

manhole. At the door of the van, and just before

getting in, he turned to speak to the labourers again,

when a shot rang out, and he collapsed next to the van.

This was between 7.30 and 7.45 a.m. and the sun was al-

ready up. Jacobs, who was also about to get into the

van, looked up in the direction from which the shot had

come and saw a black man standing some 6 metres away

next to one of the houses, pointing a firearm at him.

Two more shots rang out in quick succession and Jacobs took cover behind the van. Later he walked round to where Fourie was lying and found that he was bleeding from his left arm and his left side. In fact it appears from the post mortem report that Fourie sustained two entrance wounds on the outer aspect of the left upper arm one centimetre in diameter and about half a centimetre away from each other. One of these bullets went right through the arm, penetrating the thoracic cage between the 5th and 6th ribs, passing right through the left ventricle of the heart, and lacerating the right lung.

Jacobs says that all the labourers had fled, so he picked Fourie up, put him into the van and drove

back to Clifford and Harris' premises. An ambulance was summoned but Fourie died as a result of his wounds.

Jacobs described their assailant as being a shortish man of medium build, wearing a dark brownish or greyish woollen cap, similar to a balaclava cap, with a reddish stripe in it, a black lumber-jacket (similar to the exhibit before the Court), a pair of grey trousers, and a black pair of boots (similar to another exhibit before the Court).

Two of the labourers, Moolman and Schwartz, also gave evidence. Moolman says that when the first shot rang out and he heard the sound of the bullet, he ran for his life without so much as a backward glance.

Schwartz says that on hearing the first shot he looked up and saw a black man standing next to one of the houses with a revolver in his hand. He wore a cap and a black lumber-jacket. After that he fell down and did not look up again. Moolman says he thinks some four shots were fired in all, but he could not be sure. Schwartz says there were five shots.

The State also called a 19 year old young man Big Boy Mtuntwana who lives within a few hundred yards of the scene of the crime. He says that while he was at home one morning he heard three shots ring out in quick succession. He went outside to see what was happening. While standing next to his house, he says, he saw the appellant (whom he knew) and two companions

run past the street behind his house. The appellant

wore a dark brownish balaclava-like cap and a black

lumber-jacket similar to the one before the Court, and

in his right hand he held a firearm.

After an inspection-in-loco it was established

that the appellant lived about 400 metres away from the

scene of the shooting, and it was common cause that

Mtuntwana's house was situated between the scene of the

shooting and the appellant's house.

Another State witness was the 65 year old Petrus

Miya, a relative of the appellant. He was a herbalist

from Natal who was in the habit of visiting Port Eliza-

beth periodically for a few months at a time. When in

Port Elizabeth he stayed in Kwazakhele very close to

where the appellant lived. During 1986 he says he happened to be at his house in Port Elizabeth. At about 8 o'clock one morning, as he was busy arranging things in his house, he heard a shot. On hearing the shot, he says he stopped what he was doing, stood still listening for a while, and then walked out to see what was happening. As he got to his front gate he saw the appellant come running down the street. He was alone, and wearing a black lumber-jacket similar to the one before the Court, and a greyish-brown woollen cap with a stripe in it. He did not notice any firearm in the appellant's hands, but says that he may conceivably have had one.

Later that afternoon, towards sunset, the

appellant came to his house, and asked him whether he could help him. Miya says he asked appellant what he wanted him to do. Appellant then told him that he had shot a white man and wanted Miya to give him "medicine" so that the police would not be able to find him.

Miya asked him what the white man had done to him, where-

upon the appellant replied that they did not want white

people in their township. Miya then gave the appellant

a stick to serve as a talisman although he knew full well

that this would not safeguard him from arrest. Some

time later Miya made a statement to the police.

Detective Warrant Officer Els, the investigating officer, arrested the appellant on 1 March 1988 - more than 18 months after the offence had been committed.

Both the black lumber-jacket and the pair of black boots which were exhibits before the Court were found by Els at the appellant's home.

As a result of what the appellant told Els shortly after his arrest, Els arranged for Captain Gouws to take the appellant out to the scene of the crime on

2 March to point out certain spots. Before leaving for

Kwazakhele Captain Gouws duly informed the appellant that

he was a justice of the peace, and warned him that he

was not obliged to point out anything but that if he did,

what he pointed out and what he might say would be noted

down and could be used in evidence against him. The

appellant indicated that he understood the warning and

was still prepared to point out certain spots. Gouws,

being satisfied that the appellant was in his sound and sober senses, asked the appellant whether he had been assaulted, threatened or influenced in any way to agree to point out the spots, to which the appellant replied in the negative. Captain Gouws could see no signs of assault on the appellant, but in order to make doubly sure that there were none, he asked him to remove his shirt.

Gouws says that he noticed some tattoo marks on the appellant's chest but found no signs of any assault on him.

As Captain Gouws was not conversant with the Xhosa language he asked Sgt. Yako to accompany them to act as interpreter. Neither Gouws nor Yako were involved in any way with the investigation of this offence. They then drove out to Kwazakhele. Yako drove the car

while Gouws and the appellant sat at the back.

Captain Gouws described how the appellant had directed them to a spot where he said he had shot a white man. There they alighted and the appellant walked to a spot next to one of the houses and indicated that that was where he had stood. He told Gouws that black

people had been working in the street and that two white

men had been standing next to a van. He said that he

had fired three shots at the white men. The black

men then all ran away. The reason why he had fired at

the white men was that the Comrades did not want white

people in their area. He added that he had heard

the next day that the white man was dead. He subse-

quently sold the firearm to Lulamile for R30. Sgt.

Yako gave corroborative evidence.

In his evidence the appellant denied all involvement in the killing of Fourie. He said he had been at home at the time and that he had only heard of the murder later on. He specifically denied running down the street with a gun in his hand, as Mtuntwana had testified, and denied confessing to Miya in the way he had deposed to. He conceded however that Miya was related to his mother.

After his arrest he says that he was assaulted by several policemen in order to get him to confess to the crime. He however steadfastly refused to concede any knowledge of the offence. The day after his arrest, he concedes, Captain Gouws and Sgt. Yako took him to

Kwazakhele but he denies that he pointed anything out to them, or that he told them anything at all.

The trial Court rejected the evidence of the appellant as not being reasonably possibly true, and on a mere reading of his evidence this conclusion seems to be borne out. The admissibility of the confession made

to Captain Gouws was contested by the appellant at the

trial, and its admissibility was thereupon decided in a separate investigation - a so-called trial within a trial.

In the course of this investigation the appellant's allegations of protracted assaults at the hands of the police

were specifically rejected as untrue. The trial judge

pointed out that in view of the appellant's denial that

he had pointed out any spots or made any confession

the investigation was rather one to determine whether

he had in fact made the confession than whether he had

succumbed to the pressure of the alleged assaults to

confess. In any event it was found that the confession

had been made freely and voluntarily while the appellant

was in his sound and sober senses and without him having

been unduly influenced thereto.-----

Mr. King, who appeared in the Court below, and

before us, on behalf of the appellant, submitted that the

trial Court had erred in accepting the evidence of Mtun-

twana and of Miya. He submitted that both of them were

unworthy of credence and were deliberately lying in order

to falsely incriminate the appellant. The police wit-

nesses - Warrant Officer Els and Sgt. Mngxekeze (who

assisted Els in the investigation of the case) as well as

Captain Gouws and Sgt. Yoko - he submitted had delibera-

tely set out to mislead the Court and to this end had

conspired together to concoct false evidence of a con-

fession when in fact they had no evidence against the

appellant at all. This conspiracy, as I understood him,

extended to suborning Mtuntwana and Miya to perjure them-

selves in order to secure a conviction. Such a sub-

mission is a most serious one to make, and, in the cir-

cumstances of the present case, a most improbable one.

Moreover, the trial Court, consisting of an experienced

judge and two assessors, saw the witnesses, listened to

their evidence, were able to consider their general

demeanour and the way in which they gave evidence, and

then believed them. The great advantage which the trial

Court has over a court of appeal in being able to observe

the general demeanour, appearance and indeed the whole

personality of the witnesses in assessing their credibi-

lity, has been dealt with fully by Davis A.J.A. in R. v.

Dhlumayo and Another 1948 (2) SA 677 (A) at pp. 695-700.

The learned judge, at p. 697, comments that-----

"It is often urged by counsel that, when the court below has made no comments on the demeanour of the witnesses, then the appellate court is in just as good a position to decide the case as was that lower court. But this can hardly ever be so The mere fact that the Judge did not comment on the demeanour of the witnesses is not to say that he was not - perhaps even unconsciously - greatly influenced by the whole intangible atmosphere of the case he himself had tried. As was said by Lord Mac Millan in Watt v. Thomas (1947 (1) A.E.R. 582 at p 590)

'The Appellate Court had before it only the printed record of the evidence. Were that the whole evidence, it might be said that the appellate

Judges were entitled and qualified to reach their own conclusion upon the case, but it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial Judge possesses in reaching his conclusions, but it is not available to the appellate court.'

It is because this atmosphere can never be adequately conveyed by the record that the appellate court must inevitably in the great majority of cases be handicapped; of that handicap it should never allow itself to be unaware."

It is for reasons such as these that an appellate court will not readily depart from the trial court's findings on credibility in the absence of some clear misdirection on the evidence. In the present case Mr. King has sought to persuade us that the trial court did misdirect itself in arriving at certain conclusions,

more particularly in rejecting the evidence of the

appellant and not weighing the evidence of certain

witnesses adequately. I am not persuaded however

that any such misdirections have been shown. Mr.

King's argument, in my view, amounted to no more than

an attempt to argue the issue of the credibility of the

witnesses concerned, in much the same way that he did

at the trial. Nothing was advanced to indicate that

these findings on credibility were not justified.

.... / 18(a)

His submission of a conspiracy to concoct evidence against the appellant is therefore devoid of any real substance and cannot be entertained for a moment.

The appellant moreover was a bad witness. This is apparent on a mere reading of the evidence and I am not prepared to say that the trial court was wrong in rejecting it out of hand.

The trial court found that the appellant had taken Captain Gouws and Sgt. Yako to the scene of the shooting, and that he had made the confession to which

Gouws deposed, and there is no reason to question this

finding on appeal. Mr. King, however, sought to attack

the admissibility of the confession on another ground.

He submitted that inasmuch as Captain Gouws was a member

of the Murder and Robbery unit to which the investigating

officer belonged, and inasmuch as he had on five previous

occasions, in the course of his duty, checked the police

docket to ensure that the investigation was proceeding, he

ought not to have taken the confession from the appellant;

that this, as I understood his argument, amounted to an ir-

regularity; and that the trial court ought to have excluded

the confession on these grounds.

In his evidence Captain Gouws denied that he had

in any way been involved in the investigation of the

offence, or that he was conversant with the facts of the

case. He had never seen the appellant before Els had

brought him to his office on the morning of 2 March 1988.

He conceded, however, that in his capacity as an officer

in the Murder and Robbery unit, he was required from time

to time to check the dockets of the various investiga-

ting officers in the unit to see that the investigations

were proceeding properly and to offer advice where ne-

cessary. When performing such duties he says he may

be required to look at 60-80 dockets a month, and that it

was therefore impossible for him to remember the details

of all the cases. He conceded, too, that, according

to entries on the docket, he had checked the docket in

the present case on five occasions - the last occasion

being on 26 January 1988, some 36 days before taking the confession. He consistently repeated his denial that, in spite of these inspections, he could recall anything about the case when he saw the appellant on 2 March.

The admissibility of confessions is governed by the provisions of section 217 of Act 51 of 1977.

The criteria for the admissibility of a confession in

terms of that section are that it must be proved to

have been freely and voluntarily made, by a person in his

sound and sober senses, and without having been unduly

influenced thereto. The section then goes on to pro-

vide that confessions made to a peace officer, other than

a magistrate or a justice of the peace, shall in certain

circumstances be inadmissible in evidence. A justice

of the peace is defined in section 1 of the Act with reference to the Justice of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963). In terms of section 4 of that Act, read with the first schedule, a commissioned officer of the South African Police is ex officio a justice of the peace, and therefore entitled

to take a confession. This right, conferred on such an officer by the Act, cannot be denied him by the Court, even where he may happen to be attached to the unit investigating the offence to which the confession relates

(S. v. Mbatha and Others 1987 (2) SA 272 (A) at 279 B -

280 B). In that case the officer who took the con-

fession was the head of the investigating unit which performed its duties under his personal supervision.

His duties also required him to go through the investigating officer's dockets and to give advice and instructions where necessary. The Court there held that the fact that he had taken the confessions involved could not in itself constitute any irregularity and that the primary test was still to determine whether the confessions had been made freely and voluntarily by the accused while they were in their sound and sober senses and without them having been unduly influenced thereto. (Cf. also S. v. Khoza and Others, 1984 (1) SA 57 (A) at 59 E - 60A.) Mr. King's submission therefore, that the mere fact that Captain Gouws had taken the confession amounted to an irregularity cannot be sustained, nor does the fact that he checked the docket in the present case doubt on his credibility. The appellant's

allegations of assaults perpetrated on him by the police prior to his being taken to the scene of the offence by Gouws and Yako, were rejected by the trial court as false, and this finding, as I have indicated, cannot successfully be attacked on appeal. In any event the appellant does not suggest that any of the assaults alleged by him prompted him to make a confession. In fact he denied making any confession at all. The trial court found that he did make a confession, and that he did so freely and voluntarily, without being unduly influenced thereto, and while he was in his sound and sober senses. No good reason has been advanced to show that this finding was wrong, and Mr. King's attack on the admissibility of the confession must therefore fail.

In his appeal to this Court Mr. King also sought a special entry relating to an alleged irregular refusal by the trial judge to allow him to see Warrant Officer Els' pocket book. In raising this aspect during argument Mr. King conceded that he sought to rely solely on the record in elaborating his submissions. In

such event a special entry was not really necessary,

(R. v. Nzimande 1957 (3) SA 772 (A) at 775 A - D;

Sefatsa and Others v. Attorney-General, Transvaal and

Another 1989 (1) SA 821 (A) at 843 H - I) and so Mr.

King did not press this aspect. Furthermore, when it was pointed out to him that it appeared from the record that the trial judge had not in fact refused any such application, but that the application itself had not been

persisted in, Mr. King abandoned the point altogether.

I need therefore not refer to this aspect any further.

Another alleged irregularity Mr. King sought to rely on related to the trial judge's refusal to allow him to have insight into the police docket or to elicit its contents from Captain Gouws. From the record it appears

that during the investigation as to the admissibility of

the confession the prosecutor, after referring to the

police docket, informed Mr. King that it appeared that

Captain Gouws had inspected the docket on five occasions

prior to the pointing out. After the court had held

the confession to be admissible, Captain Gouws was re-

called to depose to its contents. In the ensuing

cross-examination Mr. King again took up the issue of

Gouws' knowledge of the case prior to taking the confess-

ion, and he asked Gouws to refer to the docket in order

to ascertain the exact dates on which he had inspected

it. After an initial objection Mr. Price agreed to

allow Gouws to look at the docket and to inform the court

of the dates on which he had inspected it. Mr. King

then asked him to tell the court what instructions he

had written in the docket on each occasion. This Mr.

Price strenuously opposed on the grounds that the in-

formation in the docket was privileged. After argument

on this issue the trial judge ruled that

"the application that you may have insight into
the docket is refused."

Before us Mr. King argued that the trial judge

had "erred and misdirected itself in upholding the State's objection", and that this constituted an irregularity.

The police docket in a criminal trial, containing, as it generally does, the statements of witnesses the prosecution intends to call, notes made by the investigating officer as to the nature and progress of his investigation, and the instructions and advice relating to the investigation inscribed from time to time by some supervisory officer, would, in my view, be prima facie privileged. It would seem to be akin to the State's brief to the Attorney-General or the prosecutor that presents the State's case to the court, and it is a well recognized principle that "as you have no right to see your adversary's brief, you have no right to see

that which comes into existence merely as the materials

for the brief" (per James L.J. in Anderson v. Bank of

British Columbia L.R. 2 Ch. D 644 quoted with approval in

R. v. Steyn 1954 (1) SA 324 (A) at 332 A - B). Steyn's

case (supra) expressly held that statements made by wit-

nesses to the police before the trial were so privileged.

In the same way, it seems to me, notes made by the investi-

gating officer in the docket, and the advice and instruct-

tions of a "checking officer" would be privileged as being

confidential communications, intended ultimately for the

Attorney-General, and made for the purpose of getting

evidence. (Cf. R. v. Steyn (supra) at p 332 E - 334 A).

To ask Gouws to tell the court in evidence what he wrote

in the docket on each occasion would in effect be to deny

the privilege and to render any protection of the information illusory (International Tobacco Co. (S.A.) Ltd. v. United Tobacco Cos. (South) Ltd. (3) 1953 (4) SA 251 (W) at p 255 H - 256 C).

Of course a party can, either expressly or by his conduct, waive the privilege, in which case the opposite party would be entitled to see the document,

(cf. S. v. Fourie en h Ander 1972 (1) SA 341 (T)) and in

the present case Mr. King contended that there had

indeed been such a waiver by the State. He contended

that the fact that Mr. Price had provided him with the

dates on which Gouws had checked the docket, and had there-

after allowed Gouws in evidence to look at the docket in

order to verify those dates, constituted a waiver of any

privilege there may have been. I cannot agree. In

Ex parte Minister van Justisie: In re S. v. Wagner 1965

(4) SA 507 (A) at 514 D - E Rumpff J.A. is reported as

saying:

"By stilswyende afstand van privilege moet daar altyd 'n element van publikasie van die dokument of 'n deel daarvan wees wat as grond kan dien vir die afleiding dat die litigant of aanklaer nie meer die inhoud van die stuk geheim wil hou nie. Wigmore beskryf die houding van die stilswyende afstanddoener soos volg in deel 8 van sy werk (3de uitg.) in para. 23:

'There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended the result or not. He cannot be allowed, after disclosing as much as he pleases to withhold the remainder. He may elect to withhold or disclose, but, after a certain point, his election must remain final.'

In order to substitute a waiver the disclosure

of the contents of the privileged document must be of such a nature as to warrant the inference that the prosecutor no longer seeks to rely on its secrecy. This inference is an objective one, and the test is one of fairness in the circumstances of the case. Here Mr. Price provided Mr. King with the five dates reflected in the docket as being the occasions on which Gouws inspected it. This he did, not to advance his own case in any respect, but to assist Mr. King in his cross-examination of Gouws. Mr. King's subsequent insistence that Gouws himself should look at the docket to confirm those dates - reluctantly conceded to by Mr. Price - was once again designed to assist the defence case and not the case for the State. To submit that these concessions

amount to a waiver of the privilege seems to me to be quite untenable. No considerations of fairness suggest such a conclusion, and the trial judge was fully justified in upholding the privilege of the docket.

Mr. King's heads of argument contains reference to a further alleged irregularity namely that the trial judge unfairly interfered with and limited cross-examination of State witnesses. This submission was not persisted in before us, and was expressly abandoned by Mr. King. I need therefore not refer to it any further.

The appellant was charged and convicted of the murder of Fourie, the attempted murder of Jacobs, Schwartz, and Moolman, and the illegal possession of a firearm. There was some suggestion in the heads of argument that

the appellant ought only to have been convicted on one count of attempted murder and not on three. This point was not argued before us, and in any event I do not think that it could have prevailed. The three complainants were together at the van when the appellant deliberately fired in their direction, apparently reckless as to whether any or all of them should be hit. In my view he was correctly convicted on all three counts. The trial judge sentenced the appellant to 10 years' imprisonment on each of the three counts of attempted murder, and to two years' imprisonment on the count of being in illegal possession of the firearm, but ordered that all these sentences be served concurrently. On the first count viz of the murder of Fourie, the court found no extenuating circumstances

and sentenced the appellant to death. An appeal was noted against the latter finding, as well as against the sentences in respect of each of the other counts.

The appellant was 21 years and 9 months old at the time of the commission of the offence, and had progressed to Std. III at school. The court found that although he was not a particularly intelligent person, he was perfectly capable of realizing what was happening about him and that he appeared to have played an active and leading role in the activities of the Comrades. The offence itself was of a particularly despicable nature. The appellant shot and killed Fourie in cold blood without any form of provocation whatever. The only reason advanced by him was that Fourie was a white

man and that he and his fellow Comrades did not want to see white men in the area where they lived. The despicable nature of the offence was properly taken into account by the trial court (S. v. McBride 1988 (4) SA 10 (A)) and I can find no reason to differ from the trial court's finding that in all the circumstances of the case there were no extenuating circumstances.

The sentences in respect of the other offences do not strike me as being at all unreasonable, more particularly in the light of the fact that they are all to run concurrently.

The appeal is dismissed.

J.P.G. EKSTEEN, J.A.

E.M. GROSSKOPF, J.A.)
 STEYN, J.A.) concur