

Case No 403/90  
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

MQABUKWENI CHONCO

Appellant

and

THE STATE

Respondent

CORAM: NESTADT, MILNE et F H GROSSKOPF JJA

DATE OF HEARING: 16 May 1991

DATE OF JUDGMENT: 24 May 1991

-----  
J U D G M E N T  
-----

MILNE JA/.....

**MILNE JA:**

The appellant was convicted of the following offences: on count one of the murder on or about 14 April 1988 in Boksburg of one Daniel Joseph Motlaung (the deceased); on count two of robbery with aggravating circumstances it being alleged that at the time and place referred to in count one he robbed Motlaung of a white Nissan E-20 minibus registration No MNY 632 T ("the Nissan") the property of First National Bank, which was in the lawful possession of Motlaung; on count three of robbery with aggravating circumstances it being alleged that on 22 April 1988 and near Katlehong in the district of Alberton he robbed Petrus Thabane of a white Toyota Hi-Ace minibus ("the Toyota"); on count four of attempted murder it being alleged that at the time and place referred to in count three he fired a shot at Petrus Thabane with intent to kill him; and

on counts five and six respectively the unlawful possession of a 7,65 mm fire-arm and 7,65 mm ammunition in contravention of section 2 and section 36 of Act 75 of 1969.

He was sentenced as follows: On count one the death sentence was imposed. On count two he was sentenced to 12 years' imprisonment and on counts three, four, five and six to 13 years' imprisonment, 10 years' imprisonment, 2 years' imprisonment and 1 year's imprisonment respectively. The sentences on counts four, five and six were ordered to run concurrently with the sentence on count three.

The appellant applied for leave to appeal against all his convictions and sentences but this application was refused by the trial judge. On petition to the Chief Justice the appellant was granted leave to appeal "against the convictions (and accordingly, the sentences in respect

thereof) on counts 1 and 2 only". The use of the words "and accordingly" indicates, in my opinion, that it was only in consequence of the grant of leave to appeal against the convictions that leave to appeal against the sentences was granted, and that it was the view of the judges granting the certificate that if the convictions were to be upheld the sentences would stand. We however heard argument on the sentences to be imposed if the convictions were to be upheld.

There was no evidence directly implicating the appellant in the commission of either of the offences referred to in count one and two. The appellant admitted that he was, on 27 May 1988, found in possession of the Nissan by the police and that on 1 June 1988 he was, in effect, found in possession of two booklets, one of which contained certain other documents relating to the Toyota. He attempted to explain his possession of the Nissan and the

documents relating to the Toyota but the court disbelieved him and found that his explanation was "a pack of lies". He also denied that he was in any way implicated in the death of the deceased or the robbery of the Nissan, denied that he was in any way implicated in the robbery of the Toyota or the firing of a shot at Thabane and denied that he had ever had any fire-arm or ammunition in his possession. The trial court found these denials to be false.

The appellant's counsel (to whom we are in indebted for an able argument) rightly, in my view, did not criticize the trial court's acceptance of the evidence for the State nor its rejection of the appellant's evidence, but confined himself to a submission that the facts proved by the State did not prove the guilt of the appellant on counts one or two, notwithstanding that he was found to be a lying witness.

The effect of the evidence for the State may be summarized as follows: At some time between 5.30 p m and about 8.30 p m on 14 April 1988 the deceased was driving the Nissan in a street in Boksburg North when he was, in some way or another, waylaid and shot from a distance of not more than 1 m on the left side of his neck (just below the junction of the neck with the jawbone). The bullet which killed the deceased was a 7,65 mm calibre Selluer and Bellet bullet. The deceased's assailant shot him in order to rob him of the Nissan. Some six weeks later (in circumstances which I shall describe later) a 7,65 mm Selluer and Bellet empty cartridge case ("the Nissan doppie") was found by the police under the right-hand side of the driver's seat of the Nissan. At about 8 p m on 22 April 1988, i e eight days after the deceased was killed, one Petrus Thabane was driving the Toyota along a road from Katlehong to Germiston when an incident occurred which is correctly described by the trial

court as follows: (the references to the accused are references to the appellant)

"His girl-friend Jwalane Molabe sat in the left front seat of the vehicle. At the post office Thabane was hailed by two men who indicated that they wanted to be transported in the direction of Germiston. Thabane stopped the bus and the two men boarded and seated themselves on the third row of seats from the front. As he approached a junction in the road, one of his passengers asked him to stop, saying that he wanted to go to the 'freeway'. Thabane obliged and as the passenger alighted from the vehicle on its left side he said that his companion would pay the fares of both passengers. Thabane saw the man walking to the front of the vehicle, but turned to face the other passenger still in the vehicle who was 'fiddling' with his fob-pocket from which a R5,00 note protruded. Thabane suddenly heard the driver's door open. As he looked round, he saw the accused with a fire-arm standing on the ground next to him. The fire-arm was a hand-gun about seven inches in length; the accused pointed it at him. Thabane said he could clearly see the face of the accused, he wore a balaclava rolled up on his head above his eyes. The accused said to him: 'Give me the vehicle' and told him to get out. Thabane did so, leaving the vehicle with its engine still running and his headlights on and the key in the ignition switch. Once outside the vehicle Thabane backed away but kept his eyes on the accused, who climbed into the driver's seat but kept the fire-arm pointed at Thabane. As Thabane alighted from the vehicle he noticed that

Jwalane Molabe climbed out of the front seat on the left side of the car and walked or ran towards the rear of the vehicle. Thabane stated that as he tried to escape he was very frightened; he could feel his legs trembling. Before he reached the edge of the road on the far side, he stumbled and fell. At that moment the accused fired at him. The bullet struck the tarred surface of the road about two feet from where he landed on the road. It caused a bright spark. Thereupon the accused pulled off in the bus."

Later that evening the police and Thabane and his girl-friend searched the area where Thabane had been shot at and Thabane found a spent 7,65 mm Selluer and Bellet cartridge case ("the Toyota doppie"). The Toyota doppie and the Nissan doppie were fired from the same fire-arm. There is a strong possibility that that fire-arm was a 7,65 mm Walther or Manhurin automatic pistol. In April 1988 the appellant's uncle was at the taxi rank in Empangeni in Natal when he saw the appellant driving a white Nissan minibus which looked new. The evidence of an employee of the owner of the Nissan was that it was new when it was the subject of the robbery.

The appellant's uncle was furthermore shown a photograph of the Nissan and said that the white Nissan that the appellant was driving in April "... het soos hierdie een gelyk ...". On 27 May 1988 the appellant was found by Detective Constable Koekemoer sitting in the Nissan which was parked in a street in Empangeni. He questioned the appellant and arrested him and parked the Nissan in a fenced-off area adjoining the Empangeni Police Station. On 30 May 1988 he searched the Nissan thoroughly and next to the right-hand bolt securing the driver's seat to the floor of the Nissan he found the Nissan doppie.

It appears that the weapon from which the bullet was fired which killed the deceased was never found.

As already mentioned, the appellant

(a) gave an explanation which was rejected by the trial court as to how he came to be in possession of the

Nissan;

- (b) denied that he had ever been to the place where the deceased was killed;
- (c) denied that he had shot at Thabane or ever been in possession of any fire-arm of any description whatsoever;
- (d) denied that he had robbed Thabane of the Toyota.

The appellant said furthermore that he did not obtain possession of the Nissan until May 1988 and that until very shortly before that he was driving his uncle's Toyota minibuses. There is one passage in the appellant's evidence under cross-examination which suggests that he admitted that he was driving the Nissan during April. He was asked

"But anyway where were you stationed at the stage when, did you see your uncle last year, during April, when you were driving the Nissan E-20 bus, the one here on Photo 1, Exh E? --- Yes, my Lord, I saw him."

Subsequent questioning of the appellant, however, revealed that he was denying that he could have been seen driving the Nissan in April. It was not his case that if his uncle saw him in April in possession of a white Nissan minibus in Empangeni it was some vehicle similar to but not the Nissan the subject of the robbery. He said that when he was driving the Nissan in Empangeni he did, on one occasion, see his uncle but that this had taken place in May. The trial court however rejected the appellant's evidence on this point and accepted the evidence of his uncle. It follows that it was in April that the appellant was seen driving the Nissan.

Furthermore, no explanation was advanced by the appellant for the presence of the Nissan doppie under the driver's seat notwithstanding that his attention and that of his counsel was pertinently drawn to the significance of the evidence adduced by the State relating to this doppie. It is

true that in theory a number of explanations could have been advanced as to how it got there which would be consistent with the appellant's innocence, but the absence of evidence laying the foundation for such explanations would remove them from the range of reasonable possibility. The following remarks of Schreiner J in Ex Parte Slabbert & Prinsloo. In re Rex v Slabbert & Prinsloo 1944 TPD 327 at 330 set out the circumstances in which it is legitimate to reject an explanation because no evidentiary foundation therefor has been laid by the accused

"In cases turning mainly or wholly on circumstantial evidence the Court has to explore the possibility that there may be an innocent explanation of apparently damaging facts. It will depend on the circumstances whether the fact that any particular explanation was not advanced by the accused is important or not. Sometimes defence evidence would be required to make an explanation appear reasonably possible. The cases relating to the recent possession of stolen goods provide frequent examples. To take a related sort of case, if the accused's hat were found in a house that had just been burgled it would theoretically be possible, even in the absence of defence evidence to

imagine circumstances explanatory of the hat's presence there consistently with the accused's innocence. The hat might have been lost by or stolen from the accused or he might have lent it to someone. It might be one of a number of hats belonging to the accused and might simply have disappeared. But unless he gave evidence laying the foundation for one or other of these explanations the possibility that one of them might be the true explanation would presumably be regarded as remote and not reasonable. In such cases the accused would fairly certainly have been alive to the explanation if true and so his failure to propound it would remove it from the range of reasonable possibility. Lapse of time may introduce the factor that the accused may have forgotten the facts which might provide an innocent explanation. Whether that might reasonably explain his failure to propound the facts will depend on their nature and on the length of time involved. Unless at the time when an explanation is to be expected of him, i.e. at the trial or earlier according to the circumstances, it is reasonably certain that the accused is aware of the facts and appreciated their importance there is no reason to reject the explanation merely because no evidentiary foundation therefor is laid by the accused."

As I have already mentioned, it is clear that the accused was pertinently made aware of the facts by the cross-examination and that he, or at least his counsel, must have appreciated their importance. There is no question of lapse of time

having introduced the factor that he may have forgotten the facts which might provide an innocent explanation. In these circumstances it is legitimate to hold that it was proved that the Nissan doppie was ejected from the murder weapon when it was fired at and killed the deceased and that it lodged under the driver's seat where it remained until it was found by the police on 30 May 1988. As already mentioned, it was proved beyond reasonable doubt that eight days after the deceased was killed the appellant was in possession of the weapon that produced the Nissan doppie and that he fired it at Thabane. That means that on 22 April the appellant was in possession of the murder weapon. It does not, of course, necessarily follow that he was in possession of it when the deceased was killed, still less that he fired the shot that killed the deceased. It is, however, necessary in considering whether that is the only reasonable inference to evaluate the effect of the appellant's false explanation as

to how he came to be in possession of the Nissan in April  
1988  
1991, the very month in which the deceased was murdered, and  
his false denial that on 22 April 1991 he was in possession  
1988  
of the murder weapon. There is a clear distinction in our  
law between the failure of an accused to give evidence where  
the case against him is based on circumstantial evidence and  
such failure where there is direct evidence implicating him.  
See S v Mthetwa 1972(3) SA 766 (A) at 769B-F. The same  
applies where the accused gives false evidence. Even where  
there is no direct evidence of what happened "at the vital  
stage of the drama" however and the trial court has to reason  
by inference, the circumstances may be such that the falsity  
of appellant's explanations may tend to strengthen the  
inferences which can be drawn. See S v Holshausen 1984(4) SA  
852 (AD) at 861D-I.

The fact that the appellant was seen driving the

Nissan within (at most) a couple of weeks after the deceased was robbed of it and murdered, coupled with the fact that eight days after that murder the appellant was in possession of the murder weapon may, in the words of Eloff AJA in Holshausen's case *supra*, "... in the absence of an acceptable explanation attract an adverse inference" namely, that it was the appellant who shot the deceased. The fact that he gave a false explanation of his possession of the Nissan and no explanation at all of his possession of the murder weapon strengthens that inference. Mr Gertsch on behalf of the appellant submitted that the distance between Boksburg, where the murder took place, and Empangeni, where the appellant was seen and subsequently found in possession of the Nissan, was a factor which weakened any inference sought to be drawn from such possession by the State. This contention cannot, however, be sustained. In the first place, what was stolen was a minibus which is by its very nature highly mobile and

capable of traversing that distance in substantially less than a day. Secondly, on his own version it was the appellant's work to drive a minibus taxi between Empangeni and Johannesburg. His work, in other words, took him to the Reef. It is necessary, of course, to bear in mind that there may be a number of reasons other than guilt of the offence charged for an accused person giving lying evidence. See S v Mtsweni 1985(1) SA 590 (A) at 594A-E and the cases there referred to. In this case it is a real factor to be taken into account that the appellant may have lied about his possession of the fire-arm and ammunition in order to distance himself not from the robbery and shooting of the deceased but from the second robbery and shooting (counts three and four). That cannot, however, explain away his false explanation of his possession of the Nissan nor the absence of any explanation for the presence of the Nissan dopper. In the circumstances of this case, unlike Mtsweni's

case, the finding that the deceased was robbed of the Nissan is a necessary inference from the proved facts - indeed it was common cause - and, for the reasons set out above, the trial court was justified in finding that it was the appellant that committed that robbery. I am satisfied also that the trial court was, in the particular circumstances, also justified in finding that it was the appellant who shot and killed the deceased. Furthermore, he fired the shot at more or less point blank range at a vital part of the deceased's anatomy and the intention to kill cannot be doubted. It follows that he was correctly convicted of the murder and robbery (counts 1 and 2).

It remains to consider the question of sentence. I deal first with the sentence of death imposed in respect of the murder charge. At the time when the appellant was sentenced the death sentence was mandatory, no extenuating

circumstances having been proved. The position has been substantially altered by the amendments effected by the Criminal Law Amendment Act, No 107 of 1990. It is unnecessary to recapitulate the principles which have been laid down in a series of decisions in this Court. There are undoubtedly aggravating factors namely, that the deceased was deliberately killed to enable the appellant to rob him and his body callously left lying in the road. No evidence was adduced in extenuation. Although the appellant went into the witness box because he said he wanted to say something to the court after the court a quo had held that there were no extenuating circumstances, he simply repeated his denial of guilt and did not seek, in any way, to extenuate his conduct. The concept of mitigating factors is wider than that of extenuating circumstances and the fact that the appellant had no previous convictions is undoubtedly a mitigating factor. It may, in appropriate cases, be an indication that there is a

reasonable prospect that a long sentence of imprisonment would reform the accused. This is one of the main objects of sentence. As against that, however, is the fact that the appellant, scarcely a week after murdering and robbing the deceased of the Nissan, robbed Thabane of the Toyota and shot at him intending to kill him - at a stage when the appellant was already in exclusive control of the Toyota and Thabane was making no effort to interfere with the appellant: on the contrary, he was trying to escape from the appellant. The prospects of reform are therefore remote. A further factor which must operate against the appellant is the fact that this kind of offence is on the increase and the deterrent aspect of the sentence to be imposed must, in the circumstances, loom large. I am, therefore, driven to the conclusion that this is one of those exceptional cases where the death sentence is imperatively called for. Mr Gertsch, rightly in my view, did not seek to argue that the sentence

imposed by the trial court in respect of the robbery charge was vitiated by any misdirection or that it was in the circumstances excessive.

The appeal is accordingly dismissed.



**A J MILNE**  
**Judge of Appeal**

|                  |   |        |
|------------------|---|--------|
| NESTADT JA       | ] |        |
|                  | ] | CONCUR |
| F H GROSSKOPF JA | ] |        |