

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A168/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
<i>20 May 2015</i>	
DATE	SIGNATURE

In the matter between:

MELIZITHA MOYO

Appellant

and

THE STATE

Respondent

JUDGMENT

Strydom, J

- [1] The appellant was found guilty in the High Court on one count of robbery with aggravating circumstances and one count of murder read with the provisions of section 51(1) of Act 105 of 1997. He was the second accused.
- [2] The appellant was sentenced to 15 years imprisonment on the robbery count and 30 years imprisonment was imposed on the murder count. The sentence

imposed on the robbery count was ordered to run concurrently with the sentence imposed in respect of the murder count. Effectively the appellant was sentenced to 30 years imprisonment.

- [3] Leave to appeal was granted to the appellant by the court *a quo* against his conviction only.
- [4] The appellant applied for condonation for the late filing of his heads of argument. Such condonation should be granted.
- [5] The court *a quo* found that the appellant, together with Sifiso Ngobeni (accused 1 in the trial), on 1 August 2013 robbed Ms. Audrey Abrahams and Mr. Christopher Abrahams of, *inter alia*, their wallets and bank cards and thereafter shot and killed the deceased Mr. Abrahams.
- [6] Accused 1 was identified by a witness during an identification parade as one of the perpetrators. The appellant was not identified during the parade nor in court by the witnesses.
- [7] The appellant was convicted based on evidence of a police officer who testified that the appellant was found to be in possession of a bank card of Mr. Abrahams four days after the robbery took place. The court *a quo* relied on the so-called doctrine of recent possession to convict the appellant.
- [8] For purposes of this appeal, it is thus important to decide whether the State has proven beyond reasonable doubt the guilt of the appellant based on the evidence of Warrant Officer Ramonyai (W/O Ramonyai) and Constable Makhwekhwe (Cst. Makhwekhwe). The question to be decided on appeal would be whether the court *a quo* correctly accepted the evidence of the policemen and rejected the version of the appellant on the basis that such evidence was not reasonably possibly true, considering all the evidence in this matter.
- [9] The evidence by the State was placed before the court through the evidence of Ms Audrey Abrahams, her son Mr Gerren John Abrahams, Ms. Mahlwane, who was the complainant in relation to count 3, and two police officers.

- [10] Ms Mahlwane testified that she lives in an informal settlement known as Zamimpilo Squatter Camp (Zamimpilo). During the early morning hours of the 4th of August 2013, she heard gunshots being fired. A bullet struck her home, and she heard the voice of a person outside which she identified as accused 1. She knew him and he stayed close to her home. In the morning, she, with the assistance of the community, contacted the police who later arrived at her home. She showed the police officers who arrived the place where her house was hit by a bullet. She further informed them that she suspected that accused 1 was responsible for the shooting. She pointed out his nearby shack to the police.
- [11] Cst. Makhwekhwe testified that on 4 August 2013 he was in the company of W/O Ramonyai when they attended to the complaint laid by Ms. Mahlwane about a shooting incident that took place the previous night. The shack of the suspect responsible for the shooting pointed out to them turned out to be the shack of accused 1, with the number 357. He further stated that when they arrived at the shack it was only the two of them but by the time they proceeded into the shack there were a number of police officers, as the backup had arrived to assist them. Later, he said he was alone when he entered the shack. W/O Ramonyai was standing outside. There he found accused 1 in possession of a firearm which the accused took out from his waist and handed it to him. Accused 1 said that the firearm did not belong to him but to a friend of his, one Melizitha Moyo. This is the name of the appellant. He explained how the appellant was drunk the previous night and that caused him to take care of the firearm to safeguard it on behalf of the appellant. He showed him the nearby home of the appellant. He arrested accused 1 and immediately took him to the police station with the police vehicle he was driving. There he booked the firearm into the SAP13 store.
- [12] When it was put to him that Captain Zulu also entered the shack of accused 1, he denied this but stated that Captain Zulu was outside the shack with other police officers. When it was put to him that Captain Zulu searched the shack of accused 1, he said not whilst he was in the shack. He denied that Captain Zulu said that he found the firearm in another shack and that he produced the firearm. Accused 1 testified that Captain Zulu said that the shack where the firearm was found belonged to one Anthony. Cst Makhwekhwe denied that it was him and

Captain Zulu who dealt with accused 1 whilst in the shack. In regard to the arrest of the appellant, Cst Makhwekhwe testified that he was not present at the shack of the appellant at the time of his arrest. He did not see W/O Ramonyai walk to the shack of the appellant. He denied that at the police station a young man pointed out the appellant and that the appellant was assaulted.

[13] W/O Ramonyai testified that after Cst. Makhwekhwe arrested accused 1 he was not told what the name of the appellant was. He only ascertained the name of the appellant after the appellant was found. He said that after accused 1 pointed out the shack where his friend lived, they went there just to find that no one was at the shack. He then told Cst. Makhwekhwe that they should rather leave because there was no one in that shack. On their way to their vehicle, they met a person and accused 1 said to him that this was his friend he referred to previously in relation to ownership of the firearm. He said that whilst Cst. Makhwekhwe was loading accused 1 into the police vehicle he searched the appellant and found an ABSA bank card in the left side pocket of his trousers. The appellant told him that it belonged to him. Thereafter he took the appellant to point out his shack which the appellant unlocked. Inside the shack, on the carpet, he found many bank cards and identification documents. The appellant said these items belonged to him. He then arrested the appellant and took him to the police vehicle. He testified that he then left with accused 1, the appellant and Cst. Makhwekhwe to the police station. He testified that the other police officers only arrived after the arrest of accused 1. He said that Captain Zulu was called long after they had finished with the arrest of the appellant. He denied that Captain Zulu was the person who searched and arrested the appellant. He testified that Captain Zulu only came to assist with the transport of the two suspects who were arrested.

[14] He identified exhibits "G1" and "G2" as copies of the bank card which he found in the possession of the appellant.

[15] W/O Menzi Miya testified that he became the investigating officer in this matter. On 5 August 2013 he took the cards and identity documents out of the SAP 13 store and phoned Ms. Audrey Abrahams, the complainant in this matter. He showed Ms. Abrahams the cards and identity documents and asked her to see

if she could recognize items belonging to her late husband. She identified a card belonging to her late husband as it was signed by him on the back. The witness confirmed that the card identified was depicted on exhibit "G1" and "G2". He established from ABSA bank that the bank card belonged to Mr Christopher Ferdinand Abrahams.

- [16] On 7 August 2013 he went to verify the addresses of the suspects. When he went into the shack of accused 1 he found a wallet hidden in the roof of the shack on the inside. Inside this wallet he found various bank cards belonging to people other than accused 1. One of the cards he found belonged to FC Abrahams as this name was scripted thereon. A photograph was later, on 12 August 2013, taken where the wallet was found in the shack. It should be noted that no photographs of the wallet and all the cards which were found were taken. The bank confirmed that this card was issued to the deceased.
- [17] It appears from the record that counsel on behalf of the State considered calling a further witness but decided against it. The witnesses in relation to which the State obtained statements were made available to the defence. It should be noted that the name of Captain Zulu does not appear on the list of witnesses attached to the indictment.
- [18] After the State closed its case, accused 1 and the appellant testified in their respective defences.
- [19] As this appeal only relates to the appellant, I do not intend to deal with the version of accused 1 in any detail. There are, however, certain portions of his evidence which should be referred to as these aspects bear some relevance when the version of the appellant is considered together with all the evidence in this matter.
- [20] Accused 1 testified that on 4 August 2013 he was asleep in his shack when the police knocked on his door. Three policemen entered, including Cst. Makhwekhwe and Captain Zulu. He explained how he was assaulted and choked in his shack. His shack was searched. He said that Captain Zulu brought the firearm to his shack and told him it was found in another shack. He denied that he had the firearm on his waist and said he would never sleep with a firearm kept on his waist. He testified that Captain Zulu pointed at a shack and asked him who

the owner of the shack was where he said he found the firearm. He told the police that one Anthony stayed there.

- [21] Accused 1 testified that he never pointed out the shack of the appellant, that he did not provide the name, Melizitha Moyo, and that he never said the firearm belonged to the appellant. He said he was taken directly to the police vehicle and whilst at the vehicle he requested his girlfriend, Beauty, to bring him clothes. He never saw when the appellant was arrested. The first time he saw the appellant was at the Langlaagte police station. He was taken to the police station in a sedan motor vehicle which was driven by Boniso. Captain Zulu was also an occupant in this vehicle. After he was detained, the police took him back to Zamimpilo Squatter Camp to go and look for Anthony, but he was not found.
- [22] The appellant testified that he was arrested by Captain Zulu. He denied that accused 1 pointed him out and that W/O Ramonyai arrested him after he found a bankcard in his pocket. He denied that he said it was his card. He denied he was taken by W/O Ramonyai to his shack where various bankcards and identity documents of people were found. He testified that accused 1 was never his friend but he knew him by sight. He explained how he was arrested. He came from the toilet and the next moment he was grabbed by Captain Zulu by his belt. He was body searched, and a wallet was found with no money inside. Only a piece of paper with phone numbers was found in the wallet. He was handed back the wallet. He knew captain Zulu for some time before his arrest. He was taken to his shack with the number of 100 on the door. Cst. Makhwekwhe also joined Captain Zulu in his shack. There he was assaulted and suffocated to point out a firearm. He could not do so as he said he did not possess a firearm. He was later taken to the police station where he met accused 1. Captain Zulu was the person who led him into the police station. At the police station a young man arrived who pointed out the appellant. When the appellant wanted to speak to the young man, he was told to keep quiet and was slapped by Captain Zulu. He testified that W/O Ramonyai was not involved during his arrest and thereafter. He saw him for the first time at the police station. He testified that at the identification parade the young man who pointed him out at the police station was one of the people that

stood on the parade. He displayed number 4 and did not point him out. He did not know him.

[23] The appellant persisted in his version that the bank card belonging to the deceased was not found in his possession. He further testified that he did not use alcohol.

[24] The court, *a quo*, found the state witnesses, including the police witnesses, were credible witnesses and accepted their evidence. The court found that Cst. Makhwekwe and W/O Ramonyai corroborated each other's versions on material aspects. The court *a quo* found that only minor discrepancies existed between their respective versions. The only probability which the court considered was based on the accepted evidence of the police witnesses pertaining to where the two bank cards were found. The court found that the finding of two bank cards of the deceased in the possession of accused 1 and the appellant connected them to each other and to the crimes. The court found that against the evidence of the two police officers the appellant only came up with a bare denial. Therefore, the court *a quo* rejected the version of the appellant as false beyond reasonable doubt.

[25] It is to be mentioned that pertaining to the non-calling of Captain Zulu as a witness, who was extensively implicated by the two accused, the court made no finding. In my view, after he was attributed a significant role by the two accused in the process of their arrest and during the cross examination of the police witnesses, he became not only an important witness for the State but also a necessary witness, particularly against the appellant as he was not identified by Ms. Abrahams or her son.

[26] The court *a quo* should have drawn a negative inference from this. In *S v Teixeira*¹ it was found as follows:

"In the judgment of the Court a quo there is no reference whatsoever to the State's failure to call either Sithole or Tshabalala to testify on behalf of the State, nor to the question whether an inference adverse to the State was justified. The burden of proof

¹ 1980 (3) SA 755 [AA]

*rested on the State to prove its case. Counsel for the State must have realised how unsafe it is to rely on the evidence of a single witness. I will disregard the fact that he failed to call Sithole. In the case of Tshabalala, however, counsel for the State must surely have realised that, if Sarah's version is to be accepted as truthful, Tshabalala's evidence could have corroborated her evidence in regard to a matter very much in issue namely the number of incidents. It was clear from Sarah's cross-examination that appellant intended disputing her evidence as to the number of incidents."*²

and further

*"In my opinion, the failure by the State to call Tshabalala to testify as a witness justifies the inference that in counsel's opinion his evidence might possibly give rise to contradictions which could reflect adversely on Sarah's credibility and reliability as a witness."*³

[27] In my view an adverse inference should have been drawn from the State's failure to call Captain Zulu. Before counsel for the State closed his case, counsel for the State, as is the norm, made available the other witnesses on the list of witnesses attached to the indictment. The name of Captain Zulu does not appear on this list. It cannot be argued that the appellant could have called Captain Zulu as a witness, as he was a policeman from the same police station as the other witnesses. One would not have expected him to support the version of the appellant. Moreover, in all probability, there was no statement made by him in the docket.

[28] The question remains, however, whether Captain Zulu, who on all versions at some stage, before these accused were removed from the scene, would have supported the other state witnesses in all material aspects. Considering that an officer arrived at the scene it would be expected that he would have been made aware of what was found at the scene, and he would have been shown the cards and identification documents allegedly found in the possession of the appellant. If this version about these findings were truthful Captain Zulu could have provided corroboration for the version of W/O Ramonyai, who was a single witness on the

² At 763 F-G

³ At 764 A

most material aspect pertaining to the finding of bank cards and identity document in the possession of appellant. Yet he was not called. The question could rightfully be asked whether the State was reluctant to call him to testify as he might have been confronted with the allegations of assault, or, because there was a risk that he might contradict the evidence of the other police officials? The defense and the court *a quo* were left in the dark. If he was called these issues could have been ventilated. The appellant was, however, prevented from cross-examining Captain Zulu. His evidence would also have assisted the trial court to determine the guilt of the accused.

- [29] Considering the roles which were attributed to Captain Zulu by both accused, the evidence of Cst. Makhwekwe and W/O Ramonyai should be analyzed and compared, to ascertain what role was played by Captain Zulu according to them. Simultaneously, to what extent some corroboration, if any, is to be found for the version of the appellant that Captain Zulu played an active role in the arrest of the appellant.
- [30] Before considering this, the Court should remind itself as to how evidence in a criminal matter should be evaluated.
- [31] It has been found by our courts on numerous occasions that in the assessment of the guilt of accused persons the Court will have to consider all the evidence which either points to the guilt or innocence of an accused.⁴ The judgment of *Van der Meyden* was approved in *S v Chabalala*⁵. Heher AJA found as follows:

*"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt as to the accused's guilt."*⁶

Evaluation

⁴ *S v Van der Meyden* 1999(1) SACR 447 (W) at p 450

⁵ 2003 (1) SACR 134 (SCA)

⁶ At 140A-B.

- [32] Cst. Makhwekhwe testified that Captain Zulu was on the scene at the time when he entered the shack of accused 1. The version of the appellant, and accused 1, is supported by this evidence to the extent that Captain Zulu came onto the scene at least shortly after the police witnesses got to the squatter camp. In contrast to this W/O Ramonyai testified that captain Zulu only arrived after the arrest of the appellant. He said he was called to provide transport to the two accused from the squatter camp to the police station. Considering the serious allegations levelled against Captain Zulu this is a material discrepancy.
- [33] There are also other discrepancies in their respective versions. Cst. Makhwekhwe testified that after the arrest of accused 1, he provided the name of his friend who left the firearm with him. This was outside the shack as he pointed towards the shack of the appellant. W/O Ramonyai was standing outside the shack when accused 1 said his friend's name was Melizitha Moyo. W/O Ramonyai said he only got to know the name of the appellant after he was found. He said that after the arrest of accused 1, he accompanied Cst. Makhwekhwe to the shack which was pointed out to be that of the appellant. When he was not found there, they left and coincidentally they found the appellant. Cst. Makhwekhwe testified that after the arrest by him of accused 1, he went directly to the vehicle and left for the police station. He did not testify that W/O Ramonyai accompanied him to the shack of the appellant before the appellant was found.
- [34] Considering these discrepancies, the two police witnesses did not corroborate the versions of each other pertaining to the arrest of the appellant and what was found to be in his possession. W/O Ramonyai was a single witness pertaining to the most material aspects of this case. His evidence should be clear and satisfactory in every material respect. In *S v Rugnanan*⁷ it was found that: *'the cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism'* and the *'requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated'*.
- [35] The Court would in the process of evaluating the evidence of W/O Ramonyai, to ascertain whether his evidence was substantially satisfactory, also consider the

⁷ [2020] ZASCA 166 (unreported SCA case number 259/18) (10 December 2020 at [23])

probability of his version. I find the evidence improbable concerning certain aspects. First, it is already a coincidence that the two police witnesses basically walked into the appellant on their way to the vehicle. More coincidentally, W/O Ramonyai found the bank card of the deceased loose in his pocket. Further, when the appellant, who would have known that name on the card and signature of someone else appeared on the card, would have said it was his. This, instead of saying for instance, something to the effect that he picked this card up. Now they proceed to the shack of the appellant and when he opened his shack various cards and identity documents of others were strewn all over the floor of the shack. Again, the appellant allegedly said that these items belonged to him. It is highly improbable that anyone would say that the identification document of someone else belongs to him, when, on a cursory examination, it does not. This is far-fetched. In my view, the evidence of W/O Ramonyai is not satisfactory on all material aspects. On certain aspects it was improbable and contradictory to the evidence of Cst. Makhwekhwe.

- [36] Moreover, the evidence of W/O Ramonyai should be considered in conjunction with the lack of evidence pertaining to this most important discovery. There is no evidence that these items were booked into the SAP13 register. These items were not brought to court and handed in as exhibits. The appellant was not charged for being in possession of suspected stolen items. Add to this, the evidence of W/O Miya was that some days later a wallet was found in the shack of accused 1. This item was not found in the presence of accused 1. In this wallet a further bank card was allegedly found which also belonged to the deceased. This evidence, which provided a further link between accused 1 and the appellant, was argued not to be improbable at all. I find it to be improbable. This wallet, which was allegedly found, was not photographed nor produced in evidence by the State. Only a photo was handed in at court depicting the place in accused 1's shack, where the wallet was allegedly found. When the photo was taken the wallet was no longer in the shack. What was brought to court was a firearm which could not have been ballistically linked to the shooting of the deceased.

- [37] Despite the finding that I am not convinced about the veracity of the evidence of the police witnesses, the Court must consider all the evidence in this matter. The question would remain whether the version of the appellant was reasonably possibly true considering all the evidence. The court *a quo* stated that the appellant did not make a good impression in the witness box. The Court referred to one aspect about his evidence relating to whether he was in fact at home on 1 August 2013 or not. At closer scrutiny of his evidence on this aspect it appears that there was no material contradiction. He explained that he is mostly at home during the time mentioned but he was not certain whether, on 1 August 2013 at the relevant time, he was at home.
- [38] In my view, the appellant was consistent in his evidence in relation to what was put to the police witnesses. He denied that the bank card was found in his pocket or that the other cards were found in his shack. He persisted in his version that Captain Zulu arrested him quite independently from accused 1. He gave a version on certain aspects which could not necessarily advance his case, but which carried the proverbial "ring of truth". For instance, the young man who identified him at the police station. This young man also appeared as a person standing on the parade. Why would this be a fabrication? He mentioned the names of the policemen in the vehicle who took him, separately from accused 1, to the police station. Again, why would he lie about this?
- [39] Both accused 1 and the appellant attributed a significant role played by Captain Zulu during their arrest. They testified that Captain Zulu oversaw an assault on them. Now the question can rightfully be asked, why would they implicate Captain Zulu falsely? They stood nothing to gain by implicating him. His involvement according to the accused did not lead to admissions or confessions being made. In my view, it is improbable that both these accused would falsely implicate Captain Zulu as they stood nothing to gain thereby.
- [40] The question which will remain is where the bank card which belonged to the deceased came from, if it was not found in possession of the appellant. This would amount to speculation. There are other reasonable possibilities, for instance, it could have been found in possession of accused 1, or it could have been picked up by someone like the young man who pointed out appellant at the

police station. He could have handed the card to the police and implicated the appellant. All of this remains speculation. Reality is, it was not for the appellant to explain this, considering his version that it was not found in his possession. The only question was whether it was reasonably possible that the bank card was not found in his possession. In my view it is.

- [41] One further aspect requires comment. Before us counsel for the State argued that the police officers had no reason to falsely implicate appellant. It was argued that this should sway the probabilities against the version of appellant, that the bank card was not found in his possession, to such an extent in favour of the version of W/O Ramonyai that the appellant's version cannot be accepted as reasonably possibly true. This argument loses sight of what was held by the SCA in the matter of *S v BM*⁸, with reference to *S v Ipeleng*⁹. The court found as follows:

"[25] The approach, that accused persons are necessarily guilty because the complainants have no apparent motive to implicate them falsely and they are unable to suggest one, is fraught with danger. This was spelled out by Mahomed J in S v Ipeleng in the following terms:

'It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: Why should the State witnesses have falsely implicated the accused?'

[26] There will be circumstances in which the absence of any apparent reason for the prosecution witnesses to fabricate a case against the accused is a relevant factor for the court to take into account in the overall assessment of the evidence. However,

⁸ 2014 (2) SACR 23 SCA at para [25] to [26]

⁹ 1993 (2) SACR 185 (T) at 189 c-d

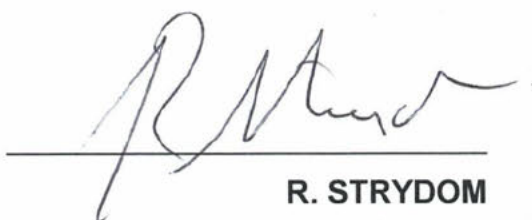
on its own, where no other circumstances are present pointing towards the guilt of the accused, it is not a proper or sufficient basis for a conviction."

[42] In this case there was no other reliable evidence or circumstances which pointed to the guilt of the appellant. The "*why will the police witness lie*" improbability was but one of the probabilities this Court considered together with all the evidence and probabilities.

[43] In my view, the State failed to prove the guilt of the appellant beyond reasonable doubt. The State failed to prove that the bank card of the deceased was found in possession of the appellant. Having found this, the Court does not have to consider the doctrine of resent possession of stolen goods.

Order

- a. Condonation is granted to the appellant for the late filing of heads of argument.
- b. The appeal against the conviction of appellant on count 1 and count 2 is upheld. His conviction and sentence are set aside.

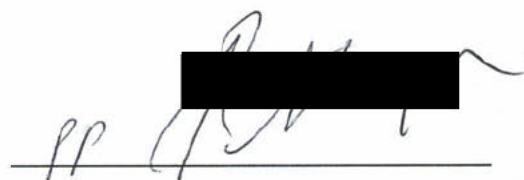

R. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree,


P. G. MALINDI
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

I agree,

A handwritten signature in black ink, appearing to be 'T.P. Bokako', is written over a horizontal line. A large black rectangular redaction box covers the middle portion of the signature.

T.P. BOKAKO

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Heard on: 12 May 2025

Delivered on: 20 May 2025

Appearances:

For the Appellant: Adv. M. Milubi

Instructed by: Legal-Aid South Africa (Johannesburg)

For the Respondent: Adv. A. Deoraj

Instructed by: National Prosecuting Authority