

SOUTH AFRICA / JUDGMENT

Abader v S (A292/2009) [2010] ZAWCHC 382 (26 April 2010)

[2010] ZAWCHC 382

COURT

Western Cape High Court, Cape Town

BEFORE

Davis, Goliath

CASE / FILE NUMBER

A292/2009

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A292/2009

In the matter between:

MOEGAMAT YUSUF ABADERAppellant

And

THE STATERespondent

JUDGMENT: 26 April 2010

Introduction

- [1] I have had the pleasure of reading the judgment of my sister Fortuin AJ. Unfortunately as I cannot agree with the approach that she has adopted, I am constrained to set out my reasons for coming to a different conclusion.
- [2] The facts are set out in the judgment of Fortuin AJ and hence it is only necessary for me to emphasise the critical factual issues. The key evidence which was accepted by the court a quo is the ballistic expert's opinion which linked the spent cartridges to the accused firearm, 9mm C2 pistol with serial number V793.

Accordingly, the firearm which killed Mr Ebrahim Satardien on 1 October 1999 was the 9mm C2 pistol with serial number V7933. That

firearm was owned by the appellant.

- [3] According to the evidence of the appellant and his father-in-law Mr Abrahams, during the evening in question the firearm was under the latter's control for the entire evening. Accordingly, appellant contended that he did not have access to the firearm on the fatal evening. Furthermore the appellant produced an alibi. He testified that he had attended an 'Eat and Treat' function in Athlone on the night in question. He testified further that he never left the function and could not have been the person who discharged the firearm to fatal effect.
- [4] The State's case was that the accused left the function, drove to Grassy Park, committed the murder and then returned to the function. Inspector Speed testified that he conducted an experiment to verify the possibility that the accused could have committed the murder by absenting himself for between 20 to 30 minutes in order to drive to Grassy Park and return to the function. Inspector Speed also confirmed that he had interviewed some five people who had attended the 'Eat and Treat' function and who confirmed that the accused was at that function for the whole evening. None of these witnesses however were called by the appellant to testify in order to support his alibi.

The judgment of Fortuin AJ

- [5] Fortuin AJ correctly, in my view, accepts the veracity of the expert ballistic evidence. She further accepts that both the accused and Mr Abrahams must have lied about the whereabouts of the firearm, given that it was used on the night in question. She finds that there was a reasonable possibility that the accused was at the function for the duration of the evening and that the other person who had control of the firearm, Mr Abrahams, could have committed the murder. This conclusion that the appellant was at the 'Eat and Treat' function for the entire duration of the evening is sought to be bolstered by the witnesses who had been interviewed by Inspector Speed. Thus, the possibility cannot be reasonably discounted that appellant's version could be true and for this reason his guilt was not proved beyond a reasonable doubt.

A different approach

- [6] Unquestionably this case must be determined upon an application of inferential reasoning as initially set out in *R v Blom* 1939 AD 188, namely that the inference sought to be drawn must be consistent with all the proved facts and that the proved facts should be of a kind that they exclude every reasonable inference, save for one sought to be drawn.

- [7] This approach has been amplified by Nugent J (as he then was) in *S v Van der Mevden* 1999

- (1) SACR 447 (W) at 448:

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent ... These are not separate and independent test, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will

be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are inseparable, each being the logical corollary of the other ...In whichever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true..."

[8] In this case, the argument about a reasonable doubt and thus a rejection of the State's case that the only reasonable inference to be drawn is not that it was the appellant who fired the firearm, turned on the possibility that the appellant was at the 'Eat and Treat' function when the murder was committed.

[9] In this connection what was said in R v Difford 1937 AD 270 272 is relevant:

"It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possible explanation of his explanation

being true, then he is entitled to his acquittal."

In this case, appellant's firearm was used in the murder. Only two people had access to the firearm, the appellant and Mr Abrahams.

There was never any suggestion that Mr Abrahams was anywhere other than at home on the evening of the murder. It was never the State's case nor that of Mr Abrahams or appellant that he was anywhere other than at his home on that particular night. This version of events was never placed in dispute. That means that the only person who could have used the firearm to fatal effect was the appellant. Nobody else had access to the firearm, nobody else knew where the firearm was and it was never suggested that a third party could have accessed the firearm. This conclusion is hugely relevant to the alibi defence.

[10] The evidence showed that it was possible for the appellant to have absented himself from the function and committed the murder and then return. True, there was a suggestion that witnesses had seen him at the function for the duration of the evening but significantly none of these witnesses was called, to support the alibi, their versions were not subjected to cross-examination and accordingly very little, if any, weight can be placed thereon.

[11] Fortuin AJ accepts the broad approach that I have adopted, save that she includes Mr Abrahams among a group of two persons who could have committed the murder. But as already stated, there is no evidence that Mr Abrahams left his home on that night. Once he is excluded, then there is only one person who could have committed the murder, based on this factual matrix. There is no reasonable inference that can be drawn, other than that it was appellant who used his own firearm to commit the murder. This is not a case when all

the evidence viewed together supports the appellant's case to the effect that he had produced a reasonable possible explanation. The facts support the inference which I have sought to draw being the only reasonable one that can be drawn.

[12] For these reasons, the appeal is dismissed.

Davis, J

I agree

Goliath, J

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Prepared on 14 October 2026 · Esheria