

SOUTH AFRICA / JUDGMENT

Monyepao and Another v S (A167/2016) [2017] ZAGPPHC 594 (19 September 2017) [2017] ZAGPPHC 594

COURT

North Gauteng High Court, Pretoria

BEFORE

S. A. M. Baqwa, T. M. Makgoka, N. Ranchod

CASE / FILE NUMBER

A167/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: A167/2016

Reportable

Of

interest to other judges

Revised.

19/9/2017

In

the matter between:

MALESELA
PARIS JEFFREY
MONYEPAO First
Appellant
THABO
CLEMENT
RAKGOALE Second
Appellant
and
THE
STATE Respondent

JUDGMENT

Bagwa J

- [1] The appellants, Mr Malesela Monyepao and Mr Thabo Rakgoale, were arraigned before the Northern Circuit District of the Gauteng

Division sitting at Polokwane on one count of housebreaking with intent to rob and robbery with aggravating circumstances, and one count of murder. They appeared with a third accused, Mr Shane Nkgapele, who was accused number one. The first appellant was accused number three and appellant 2 was accused number two. They were convicted on both counts on 10 February 2010. They were each sentenced to 15 years imprisonment on count 1 and life imprisonment on count 2. The appeal is with leave of the Supreme Court of Appeal, which was granted to the appellants respectively as follows: the first appellant in respect of the conviction only; the second appellant in respect of both the conviction and the sentence.

- [2] The charges against the appellants arose from the robbery of Dikwena Supermarket on the night of 19 September 2008 in Thabina Village, in the Naphuno district, near Tzaneen. In the course of the robbery, Mr Samuel Makgoba, a security guard at the premises of Dikwena Supermarket, was killed. His body was discovered the following morning, the cause of death being throttling and/or suffocation.

Several items were removed from Dikwena Supermarket which had been broken into through one of the windows. The appellants did not

dispute the death of Mr Makgoba and the chain of evidence to the post-mortem was admitted in terms of section 220 of the Criminal

Procedure Act 51 of 1977 (the Act) including the contents of the post-mortem report and the photo album in relation thereto.

Also handed in was the statement of Nkgapele which was marked as exhibit 'F'.

- [3] The key state witness was Mr Thomas Makwala (Makwala) who testified in terms of section 204 of the Act. The central theme of Makwala's evidence was that he, together with Nkgapele and the two appellants, had participated in the robbery of Dikwena Supermarket and the murder of the deceased. The key issue to be decided by the court was whether or not the two appellants had accompanied Makwala and Nkgapele and participated in the crimes charged.

The Evidence

- [4] Makwala testified that on 19 September 2008 whilst he was at his RDP house at approximately 14h00 he was approached by Nkgapele, who proposed that they should break into Dikwena Supermarket. He agreed with the plan as he did not have food in the house. After the agreement Nkgapele informed him that he was going to visit the first appellant.

[5] At about 18h00 Nkgapele returned with a bag containing a carjack, which he said was to be used to gain entry into the premises of Dikwena Supermarket . Soon thereafter they went to sleep at his house, and woke up at about 02h00 in the morning according to the plan.

[6] He testified further that before leaving the RDP house the first appellant arrived and they proceeded together towards Dikwena

Supermarket and in doing so they had to cross a river. Along the way the road forked into two ways, one being a gravel road leading

towards the back of Dikwena Supermarket and the other being a tar road which led to the main gate of Dikwena Supermarket. Makwala and Nkgapele took the tarred road while the first appellant proceeded along the gravel road. There was no discussion or communication amongst themselves as they walked from the RDP house to Dikwena Supermarket.

[7] Upon reaching the perimeter fence surrounding Dikwena Supermarket, Makwala and Nkgapele opened a hole in the fence and entered Dikwena Supermarket's premises. They did not observe what had happened to the first appellant.

[8] Makwala further testified that having entered the premises of Dikwena Supermarket they proceeded towards the windows. As they did so, the deceased was awakened and they had to run and seek refuge behind a water tank. It was at that point that he saw both appellants behind Dikwena Supermarket.

[9] He testified that the deceased went past the area where they had hidden themselves and proceeded in the direction of where he had observed the appellants.

[10] The evidence regarding Makwala's observations when he allegedly observed the appellants is recorded as follows:

"State Counsel: What were they doing when you saw them? Makwala: They were just standing.

State Counsel: But you are hiding yourself by the water tank.

Makwala: Yes

State Counsel: Where was accused number one by then Makwala: He was hiding at the same place"

[11] Makwala then testified that he heard a scream and he and Nkgapele moved to the front of Dikwena Supermarket where they succeeded to gain entry through the window. Nkgapele was the one who managed to go through and he passed on grocery items from inside Dikwena

Supermarket to Makwala. As they were busy removing the items, Makwala saw a police vehicle and alerted Nkgapele. They then ran out of the premises with the stolen items and went to hide the loot near a river. Before hiding it, they took out bread, 12.5kg mealie-meal, chicken feet and heads. They then returned to their place of residence where they cooked, ate and went to sleep.

- [12] The following morning they received a report about the death of the deceased at Dikwena Supermarket after which they proceeded to meet the first appellant who wanted to know what they had managed to steal. He then told them to disappear.
- [13] Makwala testified that as they prepared for the break-in, Nkgapele went to see the first appellant but did not explain to him why he did so. According to Makwala, there was never a discussion between himself, Nkgapele and the first appellant about a house-breaking.
- [14] Significantly also when Makwala and Nkgapele made their getaway they did not look for the first appellant nor did they alert him of the approaching police van.
- [15] On his second day in the witness box Makwala stated that he had forgotten to mention that he had in fact seen the appellants holding the deceased.
- [16] The nature of the evidence led by the State was both direct and circumstantial and the approach of the courts in this regard has been set out with reference to cardinal rules of logic which were enunciated in *R v Blom* 1939 AD 188 at 202 - 203 where Watermeyer JA stated as follows:

"(1) The inference sought to be drawn must be consistent with all the proven facts. If it is not then the inference cannot be drawn.

- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

- [17] The approach to circumstantial evidence and inferential reasoning is further dealt with in Zeffert, Paizes and Skeen's *The South African Law of Evidence* (formerly Hoffman and Zeffert) Second Edition (p 99 - 100) as follows:

"Circumstantial evidence is popularly supposed by laymen to be less cogent than direct evidence. This is of course, not true as a general proposition. As the courts have pointed out, circumstantial evidence may in some cases be the more convincing form of evidence. Circumstantial identification by a fingerprint will, for instance, tend to be more reliable than the direct evidence of a witness who identifies the accused as the person he or she saw. But obviously, there are cases in which inferences will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down a general rule in this regard."

The circumstantial nature of the evidence pertains to the fact that there is no one who witnessed the murder of the deceased and the court had to draw an inference regarding count 2. In my view, the quality of the evidence tendered by the State was insufficient to satisfy the test suggested in the Blom Decision.

Defence Evidence

- [18] Nkgapele testified that he was the brains behind the housebreaking at Dikwena Supermarket and confirmed that he had approached Makwala and induced him to participate. He further confirmed that Makwala having agreed to the plan, he participated in the execution thereof. He however disagreed with Makwala's testimony that the first appellant had been present when they departed from the RDP house and that the first appellant was present at Dikwena Supermarket. He further confirmed the events and sequence thereof as narrated by Makwala, at Dikwena Supermarket. He however denied having gone to the first appellant's house.
- [19] The first appellant also testified and stated that he knew Nkgapele and that they were friends. Although he had met Makwala occasionally but they were not friends. He denied having been a participant at the Dikwena Supermarket housebreaking, robbery and murder scene. The second appellant chose to remain silent and not to testify.

Accomplice Evidence

- [20] On his own admission Makwala was a participant in the crimes charged and that was the very basis on which he became a witness in terms of section 204 of the Act.
- [21] Throughout the development of our criminal jurisprudence there has been an acceptance that the evidence of an accomplice has to be treated with caution.
- [22] The best formulation of the cautionary rule as it applies to accomplices is to be found in the case of Hlapezula and Others 1965 (4) SA 439 (A) at 440 D - H where Holmes JA said:

"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self- confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit. Accordingly ... there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as a corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him; see in particular R v Ncanana 1948 (4) 399 (A) at 405 - 406; R v Gumede 1949 (3) SA 749 (A) at 758; R v Nqamtweni and another 1959 (1) SA 849 (A) at 897 G - 898 D.

Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguards aforementioned."

Section 204 Witness

[23] On his own admission Makwala testified that after his arrest he had given a statement to the police in which he omitted to mention the presence of the appellants as having been co-perpetrators of the crimes. He explained that he did so because he was afraid of them.

[24] When he gave his evidence-in-chief, Makwala testified that upon commencement of the housebreaking the deceased was awakened by the sound of breaking glass. As a result, he and Nkgapele ran and hid themselves at a water tank nearby. The deceased went past them in the direction in which he (Makwala) had seen the appellants standing behind Dikwena Supermarket. After the deceased passed, they proceeded to the front of Dikwena Supermarket to carry on with the housebreaking. When they were busy looting the groceries, they heard a person screaming but they did not go to investigate what was happening. On the second day of his testimony under cross-

examination, Makwala added another critical piece of evidence, namely, that he had omitted to say the following. After the deceased

had gone past them, he had stood up from the hiding place, gone to the corner at the rear end of Dikwena Supermarket and observed the appellants holding the deceased. His explanation under cross-examination was that he had simply forgotten to mention that detail. Later on in the trial, Nkgapele testified that Makwala never stood up from their hiding place to go to the back of Dikwena

Supermarket, thereby contradicting Makwala. Makwala had in fact contradicted himself with the added evidence because his initial

evidence was that all he had seen was the appellants standing and that he and Nkgapele had not concerned themselves with events at the back of Dikwena Supermarket.

[25] What is notable about Makwala's omission of a critical detail in his evidence is that one of the charges the accused were facing was murder. Quite evidently, the last persons to be seen with the deceased before he let out a scream would be a critical link in the chain of the State's evidence. Needless to say, the State advocate would have been privy to such information before leading Makwala in his evidence-in-chief and would have ensured that the evidence was placed on record. Such detail would not have been a matter entirely left to Makwala's power of recollection. Bearing in mind that Makwala was hoping for clemency, the probabilities to falsely incriminate others were heightened by his conduct.

[26] It is common cause that Nkgapele had made a statement to a magistrate which was tantamount to a confession. Even though in his evidence during the trial Nkgapele stated that the statement had been induced by assaults by the police, this issue had not been

interrogated as his defence counsel allowed the statement to be admitted as exhibit "F" by consent. Be that as it may, the court a quo correctly concluded that a confession or admission made by one accused was inadmissible against the other. Yet, the court went on to accept the same statement as corroboration of the evidence given by Makwala. The corroboration was to the effect that there were more than two persons when the offences were committed and the other two persons on the scene of the crime besides Makwala and Nkgapele were the appellants. This was the first misdirection by the trial court.

- [27] The said misdirection was committed despite gainsaying evidence not only by the first appellant but also by Nkgapele, who were both categorical that the first appellant was nowhere near the scene of the crime nor did he participate in any way in the commission of the crimes charged.

Single Witness

- [28] A further cautionary rule needs to be invoked regarding Makwala's evidence in that he was a single witness regarding the events

surrounding the deceased's murder. The authors D. T. Zeffert and A P. Paizes writing in *The South African Law of Evidence* (second edition) p 962 have this to say in this regard:

"Appellate courts have often said that a trier of fact should in general not be too ready to rely on the evidence of a single witness. The following passage from the judgment of De Villiers JP in *R v Mokoena* 1932 OPD 79 at 80 is frequently cited:

"The uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by section 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material aspect."

- [29] I have already alluded to the factors which militate against Makwala's credibility and I do not consider him to be a person who could be described as a competent and credible witness. I say this despite the remarks of the trial court to the contrary and which were expressed as follows:

"I looked at the demeanour very particularly throughout the proceedings and he came out as an impressive, truthful, reliable, honest and credible witness and his evidence was satisfactory."

- [30] A trial court, ordinarily, has the undisputed advantage of observing the demeanour of the witness when giving testimony and to an extent an appeal court can rely on its observations. Such observations must however be borne out by the record of evidence. When a witness contradicts himself on record and where there are significant gaps which are not in keeping with ordinary rules of logic and where a witness has a self-confessed record of lying regarding the same case in which he is testifying, his evidence has to be absolutely impeccable in order for him to emerge with the attributes that were accorded him by the trial court. In my view this was yet another misdirection by the trial court. In this regard the

remarks by Cloete JA in *S v Heslop* 2007

(1) SACR 461 at 471 e -f are apposite:

"The correct approach to the deference which a Court of appeal ought properly to accord credibility findings made by a trial court based directly or indirectly on the demeanour of witnesses who have testified orally before it, has been dealt with in a number of decisions. I merely wish to emphasise the following aspect. It is cause for concern to find laudatory epithets applied by a trial court to witness when the record shows that their performance, judged by the written word, was obviously far from satisfactory. In such a case an appeal Court will more readily interfere with the findings of the trial court as to the weight to be attached to the witnesses' evidence and its ultimate conclusion based on such findings."

As I have already mentioned, Makwala's evidence was that of a single witness which could not be corroborated by Nkgapele's confession.

This was a fortiori the case because during the cross-examination it became clear that Nkgapele had never admitted the contents of the statement exhibit F. In other words, the record does not show that its admission as an exhibit was also an admission of the veracity thereof. The State did not, however, call evidence to prove that Nkgapele was the author of the statement despite his unequivocal denial thereof.

- [31] The trial court further erred in concluding that there was a separate meeting in which an agreement was concluded between accused number one and the appellants where Makwala was excluded. This conclusion is not supported by the evidence.
- [32] Other than being placed on the scene of the crime by Makwala, the first appellant appears to have been a phantom figure who appeared just when accused number one and Makwala were about to leave the RDP house on their escapade to the Dikwena Supermarket. He talked to nobody and just walked with them in silence. There was no discussion about where they were going and what they were going to do. When the road came to a fork near Dikwena Supermarket, Makwala and Nkgapele went their own way and the first appellant proceeded on a separate route. There was no discussion even about how to enter the fenced premises with the first appellant. The first appellant is next seen standing behind Dikwena Supermarket by Makwala. He did not know how the first appellant had gained entry. When Makwala and Nkgapele make good their escape presumably from the imminent arrival of the police, they did not deem it necessary to warn the first appellant. The following day, according to Makwala, they went to ask him what happened at Dikwena Supermarket. He inquired what they had stolen and he thereupon instructed them to disappear. The narrative by Makwala was to say the least, bizarre. It left more questions than answers. The chronology of events was so disjointed especially with regard to the first appellant as to leave one in doubt regarding his presence on the day in question. With regard to appellant 2, the only evidence placing him at the scene is that of Makwala seeing him behind the Dikwena Supermarket.

[33] In assessing the evidence of Makwala the trial court stated as follows:

"it is so that he is a single witness insofar as the actual crimes are concerned. I had cautioned myself in this regard. His evidence however, is to a large extend (sic) corroborated by accused one safe (sic) where accused two and three are concerned."

This assertion by the trial court is a concession that Makwala's evidence against the appellant was the uncorroborated evidence of a single witness. In the light of the assessment of Makwala's credibility (supra), I am of the view that the conviction and sentence of the appellant ought not to be allowed to stand. Furthermore, other than the statement quoted above, the record does not show how the trial court applied the cautionary rule with regard to single witnesses.

[34] In the circumstances, having considered the conspectus of facts and submissions by counsel I am not persuaded that the State had discharged the onus of proving its case beyond a reasonable doubt. The appeal has to succeed.

[35] In the result, I make the following order:

35.1. The appeal in respect of both appellants is upheld.

35.2. The conviction of robbery and murder against the first appellant (Malesela Paris Jeffrey Monyepao) is set aside. The resultant sentences of 15 years' imprisonment and life imprisonment imposed on him, respectively, are consequently set aside;

35.3. The conviction of robbery and murder against the second appellant (Thabo Clement Rakgoale) is set aside. The resultant sentences of 15 years' imprisonment and life imprisonment imposed on him, respectively, are consequently set aside.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

T. M. MAKGOKA

N. RANCHOD

Heard on: 24 March 2017

Delivered on: 19 September 2017

For the Appellants: Advocate M. B. Moloi

Instructed by: Pretoria Justice Centre, Pretoria

For the Respondent: Advocate C. P. Harmzen

Instructed by: Director of Public Prosecutions, Pretoria

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