

SOUTH AFRICA / JUDGMENT

S v Morokoane (483/91) [1992] ZASCA 171 (25 September 1992)

[1992] ZASCA 171

COURT

Supreme Court of Appeal

BEFORE

E M Grosskopf, F H Grosskopf, Nicholas

CASE / FILE NUMBER

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483/91

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

S I MOROKOANE APPELLANT

and

THE STATE RESPONDENT

Coram: E M GROSSKOPF, F H GROSSKOPF J J A et NICHOLAS A J A.

Date Heard: 3 September 1992 Delivered: 25 September 1992

2

JUDGMENT NICHOLAS, A J A :In 1990 Simon Qhubu was a shopkeeper in Maokeng Township in Kroonstad. He also operated the business of an itinerant trader. For this purpose he had a Toyota bakkie and employed a man named Mabutane Mguni to hawk merchandise in the district. On Saturday 23 June 1990, Mguni set out in the vehicle which was loaded with groceries to the value of about R1 000. He was assisted by the 18 year old Johannes Mokoena. A schoolboy of 12 years, Thobili Qhubu, who was Simon Qhubu's nephew, went along with them.

They did not return to Kroonstad that evening as they should have done. On the following day Simon Qhubu reported them as missing to the police. On the Monday he was summoned to the Steynsrus police station, where he saw his bakkie, which was then in a damaged condition. It had been found that morning by Sgt du Plessis on the Kransdrif

3

gravel road near Steynsrus next to a sharp bend where there were brake marks and signs that it had left the road. The roof was stove in, and it appeared that it had rolled at least once. On the ground next to the vehicle was a heap of burnt goods which appeared as if they had been stock from a shop. The inside of the vehicle smelt sharply of an inflammable liquid, which appeared to have been poured over the interior of and around the bakkie. The ground surrounding the bakkie had been burnt in a circle whose radius was about 10 m. The vehicle could still be driven and du Plessis proceeded with it to Steynsrus police station.

On Wednesday 11 July 1990 Elias Motaung, a herd boy, chanced to climb upon a wall of "n ou murasie" on the farm Adalia where he was employed. He looked down on three bodies lying on the ground. The police were informed and Lieut Plater, who was attached to the C 1 D at Maokeng, arrived at the scene at about 5.30 p.m, and posted a

4

police guard for the night. He returned the following morning together with W/O van Rensburg, an official police photographer. The scene was carefully examined and spent bullets were collected. Photographs were taken of the general scene, of the bodies, and marks on the wall of the murasie which had apparently been caused by projectiles fired from a weapon. The bodies were then removed to the mortuary, where they were identified as those of Mguni, Mokoena and the young Qhubu.

On post mortem examination it was ascertained that each of the men had died as a result of penetrating gunshot wounds. Mguni was found to have sustained two contact wounds in the back of the head, and a third in the back of the neck. In the case of Mokoena, there was a wound in the right side of the trunk penetrating through the abdominal wall, and a wound in the back of the neck. Qhubu, had sustained a gunshot wound at the back of the head, a second through the right side of the thoracic cavity from the

5

back; and a third from the back through the left side of the thoracic cavity. On 14 July 1990 Plater went to the farm Malana, about 5 kms from the scene of the murder. It was occupied by Mr Nico Lategan, who on 18 June 1989 had reported to the police that his ,38 Special Arminius revolver and holster, which he had acquired only a month before, had been stolen from the farmhouse, together with a box containing 44 cartridges. Lategan suspected that the thief was Samuel Isak Morokoane, one of his labourers, who had disappeared at the end of June 1989. On his arrival Plater spoke to Lategan and was shown a heap of sand into which Lategan had fired practice shots with his .38 Special. From it Plater unearthed two spent bullets.

On 29 August 1990, as a result of information received from one Thys Mokoena, Plater went to the farm Meriba, which is the next farm but one to Malana. There he encountered Samuel Isak Morokoane, who agreed to accompany

6

Plater to Kroonstad for questioning. Later on the same day Piater returned to Meriba with Morokoane and three policemen (Det. Cst. Ntaku, Det. Lance Sgt. Semela and Cst. Remot-shela). At the farm Morokoane indicated as his room one of five adjoining rooms having a common stoep. He pointed out a spot on the stoep where Semela dug against the wall and extracted from under a cement block a plastic shopping bag containing a .357 Magnum revolver and holster loaded with .38 special cartridges, and also found a dark-coloured holster. Piater thereupon arrested Morokoane on a charge of unlawful possession of a firearm. Asked where the "other gun" was, Morokoane said that it was with his brother. Piater was told that Morokoane's brother had been present before the police arrived, but had fled into the bushes. Piater handcuffed Morokoane to the seat of his Kombi vehicle and drove away from the scene, leaving behind the three policemen to lie in wait for the brother. He proceed about 5 km in the direction of Kroonstad and, using the 2-way radio, summoned

7

reinforcements to help look for the missing man. On their arrival, he drove back with them towards the farm. When they were one or two kilometres away, he encountered Semela, who had been shot in the right hand and who made a report to Piater. It appeared that the brother did return, but when the police tried to arrest him, a gunfight occurred. Piater immediately went to the brother's room. There he found Ntaku lying dead with a bullet wound in the chin. The brother had run away again and could not be found. Piater took possession of a bullet found at the scene, and later received another bullet which was extracted from the body of Ntaku at the post mortem examination.

On 1 November a human skeleton was found by a farm labourer at place on Meriba 3 kms from Morokoane's room. It was fully clothed. Next to it Piater found a ,38 Special revolver, and in the skull Piater found a bullet. When at a later stage Piater showed the clothing to Morokoane, the latter identified it as having belonged to his brother Joseph

8

(alias Oupa) Morokoane. On 10 November 1990 Mr J H Myburgh of the farm Fairfield identified as his property the revolver and the dark holster which Morokoane had pointed out. It had been stolen early in February 1990. On 14 June 1991 Morokoane was arraigned before a court composed of VAN COLLER J and two assessors sitting at Kroonstad. He faced eight charges, including three (counts 6, 7 and 8) of murdering respectively Mabutane Mguni, Johannes Mokoena and Thobile Qhubu. He was also charged with housebreaking and theft arising out of the theft from Myburgh of a Taurus ,357 Magnum revolver in February 1990 (count 1); raping Pauline Taunyane on 17 February 1990 at the farm Welkom in the district of Kroonstad (count 2); robbing Jorita Moopelo at the same time and place (count 3); housebreaking and theft arising out of the theft of a ,38 Special revolver from Lategan on 18 June 1990 (count 4); and robbing Mguni, Mokoena and Qhubu on 23 June 1990 of the

9

Toyota bakkie, groceries and R70,00 in cash (count 5). He pleaded not guilty on all counts but was found guilty of theft on count 1, and as charged on counts 2, 3, 6, 7 and 8. On each of counts 6, 7 and 8 he was sentenced to death. He appealed in terms of S 316 A (1) of the Criminal Procedure Act 51 of 1977, against the convictions and sentences on counts 6, 7,

8. He also purported to appeal against the convictions on counts 1, 2 and 3, but as leave to appeal was not obtained in respect of those counts we cannot consider them.

The case for the State rested in the main on the proof of the facts as outlined above; on expert ballistic evidence; and on pointings out by Morokoane on 30 and 31 August 1990. The State also tendered evidence of a statement which Morokoane made to a magistrate on 30 August 1990. The admissibility of this statement was challenged and it was excluded after a trial of the question.

Plater gave evidence that he delivered to

10

Major Lubbe of the Ballistic Unit in Pretoria :

- (i) Six bullets marked A - F collected at the scene of the murder; (ii) Two bullets marked G-H collected from the heap of sand at Lategan's farm Meriba; (iii) Myburgh's revolver (exh 1) which was pointed out by Morokoane outside his room on the farm; (iv) The bullet found lying next to Ntaku's body, and the bullet extracted from his body on post mortem examination; (v) The ,38 Special revolver (exh 4) found next to Oupa Morokoane's body on 7 November 1990; (vi) The bullet extracted from the skull of Oupa Morokoane.

It was not possible to carry out ballistic tests on exh 4 because it was badly rusted and covered with blood. However, on all the evidence it was established

11

beyond peradventure that exh 4 was Lategan's revolver which had been stolen from him on 18 June 1990.

Lubbe's evidence was not challenged by the defence in any way. It established that -

- (a) of the six bullets referred to in (i) above, five were fired from exh 1, and one was fired from exhibit 4; (b) each of the bullets variously collected from the sand heap, found lying next to Ntaku, extracted from his body at the post mortem and extracted from Oupa Morokoane's skull, was fired from exh 4.

The circumstances in which Morokoane came to point out places on 30 and 31 August 1990, and to make a statement to a magistrate on 30 August, appear largely from the evidence of Lieut De Ru, who was attached to the C I D at Sasolburg. On 30 August 1990 he was approached by Lieut-Col Voigt, who was in charge of the C I D for the Kroonstad

12

district, for assistance in the investigation of a charge of murder. He knew nothing of the case except what he had read and heard in the newspapers and on the radio. He arrived in Xroonstad at about 4 p m and received Morokoane from Plater. De Ru interviewed Morokoane in an office and duly warned him. Morokoane said that he understood -he warning and that he still wished to point out certain places. Morokoane told De Ru that he had no fresh injuries or scars on any part of his body, and an examination by De Ru revealed none. They then set off. Lieut Symington was driving the vehicle in which De Ru was the front seat passenger, and Det Cons Majaii and Morokoane occupied the back seat. A photographer, Cst Saunders, followed in a second vehicle.

They left Kroonstad at 16h55. Morokoane pointed out various places, and photographs were taken by Saunders. At 18h00 it was decided to break off the operation because of fading light, and to meet again the

13

following day. De Ru, Symington, Majafi and Morokoane set out on the return journey to Sasolburg. On the way Morokoane and Majafi conversed together, which prompted De Ru to ask Morokoane whether he would like to make a statement to a magistrate. He replied that he was prepared to do so,

and De Ru made the necessary arrangements by radio for a magistrate to be available. Arrived at Sasolburg, De Ru drove straight to the magistrates' court and handed over Morokoane to Mr Holtzhausen, the magistrate. Later De Ru received a document from Holtzhausen and lodged Morokoane in a single cell at the Sasolburg police station. He said in his evidence that when he took Morokoane to the magistrate Morokoane had no injuries. His condition was exactly the same as it had been when he received him. On the following day they returned to Kroonstad where the pointing out resumed. When this was finished he read to Morokoane the notes he had made of the pointing out. Morokoane was satisfied with the notes and appended his signature on each

14

page. De Ru delivered Morokoane and the document he had received from Holtzhausen to Capt Marx of the c I D unit at Kroonstad. He did not see Morokoane again. The defence disputed that the statement to Holtzhausen was made freely and voluntarily and a trial-within-a-trial was held. Morokoane alleged that he was assaulted in the C I D offices at Kroonstad during the early evening of 30 August and by this means was forced to agree to accept as his own the account given to him by a police captain and to repeat it in a statement. The evidence of the policemen who gave evidence for the State was that Morokoane was taken straight to Sasolburg when the

pointing out was abandoned on 30th August, and that there was no detour to Kroonstad. VAN COLLER J said in the judgment of the trial court that the State witnesses gave their evidence in a satisfactory manner, and although there were certain contradictions between them, these were not material. Morokoane on the other hand could not be described as a good witness. Parts of his evidence

15

could not be accepted. However, this did not necessarily mean that his account of the alleged assaults could not reasonably be true. The problem for the State lay in the fact that Holtzhausen's evidence was that when he asked Morokoane whether he had injuries or bruises of any kind, the reply was that he had a swelling on the right eye, the result of the police striking him "om my boetie te gaan uit-haal", and Holtzhausen noted that his right eye was slightly swollen. The trial judge said that De Ru's evidence was that when he examined Morokoane on the afternoon of 30 August, Morokoane did not mention that he had been injured and De Ru did not see fresh injuries on him, and that unless De Ru made a mistake when he said he did not see the eye injury (which was improbable) the injury must have occurred after De Ru examined him. It was accordingly found that the State had not proved beyond a reasonable doubt that Morokoane's statement had been voluntarily made and it was ruled to be inadmissible.

16

It was also the defence contention that although there was no attack on the admissibility of the pointing-out on 30 August, the pointing-out on 31 August was not free and voluntary and was inadmissible in terms of the judgment in *S v Sheehama* 1991(2) SA 860 (A). The trial court rejected as not reasonably true the evidence given by Morokoane that he believed that if he did not co-operate on 31 August he would be assaulted, or that a police captain had told him that he had no choice but to continue with the pointing out. It found that the State had proved beyond reasonable doubt that the pointing out on 31 August was voluntary and that there was no improper influence.

This decision was the target of the appellant's main attack on the convictions for murder. I do not find it necessary to consider the detailed submissions made by Morokoane's counsel in this regard. I shall assume, without deciding, that the evidence as to the pointing out on 31 August was wrongly admitted. The question then is

17

whether on the other, admissible, evidence, Morokoane's guilt was proved beyond a reasonable doubt.

In the course of the evidence given in his own defence Morokoane said that he had once lived on the farm Fairfield but he was not there at the beginning of February 1990. He did not enter the house at Fairfield and he did not steal the revolver exh 1. In June 1990 he was living on the farm Malana. He did not enter Lategan's house or steal the firearm exh 4. He denied that he participated in the robbery and murder of the three hawkers.

Morokoane acknowledged that on 29 August he was taken by the police to Mariba, but said that at no time before Ntaku was killed did he get out of the vehicle. He denied that the police dug out a firearm in his presence or that he pointed out the place. According to him, Piater had already shown him a firearm similar to exh 1 in his office earlier that day. In giving the credibility findings of the trial court, VAN COLLER J said that Piater

18

was a good witness, who was corroborated by Semela in regard to the finding of exh 1. It was beyond question that the revolver had been stolen from Myburgh and there was no apparent way in which Piater could have acquired earlier possession of it, or why he should have wished to falsely implicate Morokoane by evidence that the firearm was found at the latter's room.

The accused, the trial court found, was a weak witness. He frequently tried to evade questions. His explanation in regard to the reasons which he said the police gave him for going on the pointing-out operation on 31 August could not be accepted. His evidence differed in various respects from what was put by his counsel to State witnesses. He contradicted himself. The trial court had no hesitation in rejecting Morokoane's evidence regarding the revolver, exh 1.

It is possible to construct the outline of a scenario which is consistent with all the proved facts.

19

At some time during Saturday 23 June 1990, and probably on or in the vicinity of the Kroonstad-Steynsrus road, the Toyota bakkie was hijacked. It was driven with its contents and its three occupants (Mguni, Mokoena and the young Qhubu) to the murasie. There they were made to stand facing the wall and were murdered with gunshot wounds in the back of the head and the back, shots being fired from two firearms. The gunmen then drove off in the bakkie, but when driven at speed round a sharp bend in the Kransdrif road, it went out of control, left the road and rolled at least once. The hijackers selected the groceries which they wanted and left the rest (e.g. bottles of vaseline, noted by du Plessis). They tried to set fire to the vehicle and the abandoned contents, and somehow carried away the remaining groceries. The appellant's counsel disputed that on the evidence it was the only reasonable inference that Morokoane was one of the gunmen. He said that the only evidence

20

evidence linking Morokoane to the murders was his possession of exh 1. He pointed to the long interval between the 23 June 1990 and Morokoane's pointing out of the revolver on 29 August. The suggestion was that Morokoane might have acquired the revolver after 23 June. There is nothing

to support the suggestion. Counsel sought to rely on something which Morokoane said under cross-examination, namely, that at the first interview with Plater in Kroonstad on 29 August, Thys Makoena, the police informer, had said that he had borrowed the firearm from Morokoane. It was submitted that it appeared from this that exh 1 was at times in the possession of persons other than Morokoane. But in fact Morokoane denied all knowledge of the revolver and this statement, if it was made by Thys Makoena, cannot help him. Then it was suggested that the brother might have had access to the hiding place of exh 1. This was theoretically possible, but there was no evidence to support it. The probabilities are against it. Oupa Morokoane himself had a

21

revolver (exh 4) which could fire bullets of the same calibre as exh 1, and both revolvers were fired at the murasie on 23 June 1990. There is no merit in the appeal against the conviction and it falls to be dismissed.

I turn now to the appeal against sentence. Under the new regime in regard to the death sentence which was introduced by Act 107 of 1990, it is the duty of this court to make findings as to the existence of mitigating and aggravating factors and then to consider in the light of those findings whether a sentence of death was the proper sentence.

Counsel for Morokoane submitted that there were a number of mitigating factors.

The first was Morokoane's clean record, which, it was said, indicates that he did not have a propensity for violence or crime. The force of the submission is diluted by the consideration that although no previous

22

convictions were proved at the trial, this was not a case of a single fall from grace after what had theretofore been a blameless life. The convictions in this case on count 1 (theft of exh 1 from Myburgh in early February 1990), and on counts 2 and 3 (rape and robbery on 17 February 1990, in the course of which a shot was fired from exh 1) show that Morokoane had before the hijacking already embarked upon a course of criminal conduct. Then it was submitted that since the trial court did not make a finding on the extent of Morokoane's participation, this court cannot find that he had more than *dolus eventualis*. There is no problem in this regard. The fact is that Morokoane fired five of the bullets which were collected at the murasie. What was done to the three hawkers was execution by firing squad. Unquestionably the gunmen had a direct intention to kill and so to eliminate those who could bear witness against them.

The third factor which is said to be

23

mitigating was that the minimum force necessary was applied to the victims, indicating that Morokoane is not an unreformable man of violence. The point about minimum force is difficult to grasp when what was done was to destroy the brains of the victims, and the conclusion is a non sequitur.

In my opinion there are no factors present which would serve to mitigate the murders or punishment which they call for.

The aggravating factors are obvious. The executions which followed the hijacking were part of a cold, calculated, ruthless scheme. Morokoane had the direct intention to kill. The object of the killing, it is clear, was to eliminate witnesses. There must have been severe psychic trauma to the helpless victims who must have had at least a foreboding that they were being driven to the slaughter.

There can be no doubt in my opinion that the

24

death sentence in this case is the proper sentence. The facts show Morokoane to be a man without compassion or feelings of remorse, and indifferent to the suffering of his victims, two of whom were young. The possibility of reformation would seem to be remote. The case is one which cries out for retribution and the ultimate deterrent.

The appeal against the convictions, and sentences are dismissed. The sentences of death are confirmed.

H C NICHOLAS A J A

E M GROSSKOPF J A

F H GROSSKOPF J A Concur.

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