

SOUTH AFRICA / JUDGMENT

S v Voegt and Another (181/96) [1998] ZASCA 9 (16 March 1998)

[1998] ZASCA 9**COURT**

Supreme Court of Appeal

BEFORE

Howie, Harms, Zulman

CASE / FILE NUMBER

181/96

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**CASE NUMBER: 181/96**In the matter between:

In the matter between:

Stanley Voegt

First Appellant

Winston Maholwana

Second Appellant

and

The State

Respondent

CORAM: HOWIE, HARMS and ZULMAN JJA

Date of Hearing: 23 February 1998 Date of Judgment: 16 March 1998

JUDGMENT

2 ZULMAN JA

The appellants were charged with two other accused in the Cape of Good Hope Provincial Division with the murder of one Harold Eksteen, the possession of unlicensed firearms, and the possession of ammunition without a licence. The appellants were convicted on all of the charges. The other two accused were acquitted. The appellants were sentenced to life imprisonment on the murder count and to two years on each of the counts relating to the possession of firearms and ammunition. The appellants appeal, with leave, to this Court, both against their convictions

and sentences.

The alleged murder took place on the morning of Sunday 15 November 1992 at a garage forming part of a house in Mitchell's Plain. The state case against the appellants was based principally upon the evidence of one Lawenda Pipers, who was living with the deceased as man and wife at the time, and one Peter William Davids who was a neighbour of the deceased. Pipers and the deceased were dealers in dagga and mandrax.

According to Pipers, shortly before nine o'clock on the morning in question the two appellants, the two other accused and an unidentified man arrived at the

3 kitchen door of her home. (For convenience, the other accused will be referred to as accused number three and accused number four respectively.) Accused number three asked where the deceased was. She advised him that he was in the garage to which he replied that they "wou 'n ding stink maak". Pipers went to the garage and informed the deceased of the arrivals at the house. The deceased indicated to her that she should tell the persons to wait. The neighbour, Davids, who she had previously called to come to the house, was then with the deceased in the garage.

The witness returned to the kitchen and informed the arrivals that the deceased had indicated that they must wait. Accused number three said that she should tell the deceased that "hy moet gou maak". The witness returned to the garage. As she was about to open the garage door she felt someone push her to one side from behind. This person was the first appellant. He then drew a firearm from the front of his trousers. He went into the garage. She observed what was going on in the garage from a window next to the garage. She shouted to the deceased, who was known as Lampies, "Lampies hy gaan jou skiet". According to Pipers the first appellant stood some 2,5 to 3 metres from the deceased who was then seated, aiming the firearm at the deceased's head with his arms outstretched. He fired three shots, one after the other, at the head of the deceased. She heard no discussion between the deceased and the first appellant before the shots were fired.

The first appellant then came out of the garage and walked to the kitchen door.

4 The three other accused and the unidentified man stood at the kitchen door. Pipers described how she saw the second appellant and accused number three then go into

the garage and Davids come out. Davids wanted to run out of the house but was prevented from doing so by accused number four and the unidentified man. They chased Davids with pangas. Pipers intervened. She asked the two persons to not harm Davids, telling them that he was her neighbour. They desisted from assaulting from Davids and returned to the kitchen door. She escorted Davids to the "TV kamer" in the house. Pipers then returned to the kitchen. While she was in the kitchen she heard two shots being fired. She went to the garage door which was then open and stood there. She saw appellant number two in the garage sitting "op sy hurke met 'n swart vuurwapen by Lampies se kop". The deceased was lying on the ground on his stomach with his head turned to one side. Appellant number two then fired a shot at the deceased. Pipers variously described the shot as being fired "teen aan sy kop" and "na sy kop". The second appellant lifted the deceased's head. He then came out of the garage and shouted "o la eina-o la eina hy's wit bene". He and his companions then left the house. They crossed the road and passed through properties on the other side of the road. Shortly thereafter the police and an ambulance arrived at the house. The deceased was taken away. According to Pipers the main tip-up door of the garage, which is visible on a photograph which was handed up as an exhibit, was locked at all 5 relevant times and she had the keys.

Davids gave evidence to the effect that he went to the house of the deceased at about nine o'clock on the morning of the murder after he had heard Pipers call for him. He met Pipers at the kitchen door. She took him through to the garage. The deceased was sitting on a chair in the garage. He was busy lighting up what is known as a "green pipe" in which Mandrax is placed. Davids sat down on a plastic crate at the side of a motorcar. The deceased made a "wit pyp" for Davids which Davids lit. Pipers came to the garage with a message that the first appellant wanted to see the deceased. The deceased gestured to her that they should wait. Pipers went away. Not long thereafter she returned to the garage. Suddenly, according to Davids, the door opened partially. The first appellant entered and said "jy Lampies". He had a firearm in his hand. He heard first appellant fire three shots. There was then a click sound. (This is according to the summary of evidence given by the trial Court in its judgment. The inference would appear to be that the gun jammed or contained no more ammunition.) The manner in which the firearm was held coincided with the two handed description given by Pipers. Apart from the deceased, the first appellant, and himself there was nobody else in the garage at the time. Davids jumped up

and ran out of the garage door passing through the passage door in the direction of the kitchen. En route he passed the second

6appellant and accused number three. He also came across two unidentified men, appellant and accused number three. He also came across two unidentified men, one of whom drew a knife. Pipers intervened saying that he was her neighbour and that they should not harm him. Thereupon Pipers took him into the sitting room of the house and closed the door. When quietness returned Davids came out of the room. Everyone had gone. He went to the garage where he found the deceased lying on the floor. Pipers was with him. He did not hear a second round of shots.

Both the appellants gave evidence in their defence. In essence the defence of the first appellant was that although he was at the house of the deceased on the day in question and in the garage he did not fire any shots at the deceased or anyone else and had no firearm with him. According to him he had gone there to discuss with the deceased the question of certain Mandrax tablets for which he had paid the deceased R1 500,00 in advance and which he had not received from the deceased. While he was in the garage with the deceased three unknown masked intruders entered the garage through the tip-up door with firearms. They fired at the deceased. He then left the garage in fright. He heard the sound of three shots and ran out of the house into the yard of the house of a Mr Johnson. From there he went to the second appellant's car which was parked one street away. The second appellant and the other two accused were also in the car. The second

7 appellant then drove off at speed proceeding to a Kentucky Fried Chicken shop where the second appellant wished to purchase food for his brother-in-law who was then in police custody. While he was waiting for the second appellant outside the shop he was involved in an altercation with an unknown man who pushed him to the ground causing an injury to his head. He chased this person who ran into the nearby police station. The police intervened and told him that they were looking for him because the deceased was shot dead, and that he had been at the deceased's house. He was then assaulted by a policeman with a baton. He next woke up in a police cell.

Second appellant's version was to the effect that although he was in the kitchen of the deceased's house on the morning in question he was not in the garage at all and did not fire any shots at the deceased. While he was in the kitchen he heard shots being fired. He ran from the house in fright. He had no firearm with him. He drove off at a speed in his car with the first appellant and

the other two accused to the Kentucky Fried Chicken shop. There he purchased food for his brother-in-law and took it to the nearby police station where his brother-in-law was being held. He was told by the police that they were looking for him and the first appellant. He, the first appellant and accused number three were then taken to the cells in the police station. (Accused number four was arrested only later.) He told the police

8 that he knew nothing about a person who had been shot dead. In his evidence at his trial he stated that he had had prior trouble with Pipers, the implication presumably being that this disposed her to give false evidence against him.

The court a quo (Prest AJ and two assessors), in convicting the appellants, made strong credibility findings. It found that Pipers had made "a singularly good impression on the court" and "indeed the longer and more intensely she was cross-examined, the stronger and clearer became her evidence". Although the court found that Davids was not a satisfactory witness in all respects, it treated his testimony, where it was not corroborated, with caution. As regards the first appellant the court a quo found that he had made "a singularly bad impression" upon it and that he was manifestly lying. As regards the second appellant it found that he was "equally a most unsatisfactory and lying witness". It rejected the versions of the two appellants as not being reasonably possibly true.

Counsel for the appellants, being alive to the credibility findings of the court a quo, and to the well-established principles governing the hearing of appeals against such findings, directed various criticisms in argument to such findings in an endeavour to show that the recorded evidence showed them to be clearly wrong.

9 Counsel pointed to various contradictions in Pipers' evidence, the most important being the contradiction between her evidence and the evidence given by the district surgeon, Dr Siroka. If Pipers' version is to be taken literally, namely, that the deceased was shot at point blank range, then one would have expected bum or powder marks to have been found on the deceased's body. According to the evidence of Dr Siroka the shots fired at the deceased must have been fired from a distance of more than ninety centimetres and certainly not at point blank range. The trial Court was aware of this contradiction and in my view dealt with the matter correctly by having regard to the evidence in its totality and to the possibility that there was an error of observation on the part of Pipers. I venture to suggest that Pipers might also have exaggerated the position. This contradiction, of itself however, does not in my view constitute a sound basis for

rejecting her evidence and for upsetting the credibility finding made by the court

The next criticism directed towards the acceptance of both the evidence of Pipers and of Davids was that there were contradictions in various statements which they made to the police. It is true that there are such contradictions. Again the court a

quo was alive to them. I do not believe that they are material. They may well have been occasioned by the fact that the police officers who took the statements, and

10 particularly the police officer who took the first set of statements, were

inexperienced. Pipers also explained that when she made her first statement, which

was shortly after the occurrence, she was frightened and shocked. There is no

good reason to reject her explanation.

The contradictions between the evidence of Pipers and Davids, which were referred to by counsel, are the very type of contradictions which to my mind indicate that the two witnesses did not conspire with one another to falsely implicate the accused, as is necessarily implied if the defence story were true. If they had done this one would not have expected these contradictions to have | existed. The contradictions, which are in any event not material, if anything, lend credence to their testimony and are destructive of the contention that they conspired with one another.

Counsel for the second appellant contended that Pipers was to be regarded as a single witness whose testimony was to be approached with caution in that she was the only witness who gave evidence concerning the second appellant's shooting of the deceased. In this regard reliance was placed on the proposition by Hoffmann and Zeffertt - The South Africa Law of Evidence (4thEdition) where the learned authors suggest that where there is more than one witness in a case but

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only one witness on a point in issue, while the evidence of the others relates to peripheral matter, having no bearing on the credibility of the crucial witness, the latter should be treated as a single witness. Assuming, without deciding, the correctness of that proposition, it follows that where there are other witnesses who give evidence on matters which are not "peripheral" but directly relevant to the "credibility of the crucial witness" that witness is not to be regarded as a "single witness" for the purposes of the "rule". The "rule", as the authors point out is "not

a rule of law, but reflects common sense

" The evidence of Pipers is therefore

not to be considered in isolation. She is corroborated in material respects by Davids whose evidence fits in with the whole tenor of what she deposed to. The two appellants place themselves at the deceased's house at the relevant time and in the case of the first appellant in the garage where the deceased was shot. This evidence is not peripheral and has a direct bearing on the credibility of Pipers.

Plainly, there was no onus upon the appellants to satisfy the court that the version of the state witnesses was false and that theirs was true. All that was necessary for their acquittal was that their version was reasonably possibly true. An examination of their evidence indicates beyond doubt to me that their versions are not

reasonably possibly true.

12 As regards the version of the first appellant I find it unacceptable, if he was telling the truth, that he would not have mentioned the fact that the deceased had been shot by masked intruders either when he was apprehended at the police station or when he initially gave evidence at an application which he made for bail shortly after the incident. There are furthermore a number of material contradictions between the evidence that he gave at the trial and the evidence that he gave at the bail application. These contradictions demonstrate that he was not being truthful. For example he contradicted his evidence at the bail application where he originally said that he was not present in the garage at the time of the shooting whereas in his later evidence there and at the trial he admitted that he was indeed present when the three armed persons entered the garage. According to the first appellant's evidence at the trial he had already paid R1 500,00 to the deceased for 150 Mandrax tablets which he had not yet received. Notwithstanding this he gave evidence at the trial to the effect that he went to the deceased's house on the spur of the moment. His account of what took place after the shooting, if he is to be believed in regard to the masked intruders, is also improbable. It is strange, that he would have simply proceeded to a Kentucky Fried Chicken shop and not have considered it necessary either to remain at the garage to try and render some assistance to the deceased or to have reported the matter to the police initially or even when he was at the police station to have made mention of the masked

13 intruders.

The second appellant's version that he was not in the garage during the shooting is equally improbable and unacceptable. Despite his alleged lack of knowledge of what took place in the garage the second appellant made no attempt to ascertain from the first appellant and the other two accused as to what is alleged to have taken place in the garage. According to the second appellant's evidence he decided, for no apparent reason, despite his original intention to visit a certain Roslyn, to accompany the first appellant to the home of the deceased. Notwithstanding the second appellant's statement that he had no knowledge of the shooting incident it is difficult to understand why he made no attempt to summon the police or an ambulance or at least to find out what had taken place. What he did after the incident was to unconcernedly go on with his normal affairs.

The convictions were therefore fully justified on the evidence. As regards the question of the sentence, it is undoubtedly correct that a sentence of life imprisonment is the maximum sentence which can now be imposed. It was contended on behalf of both appellants that the court a quo had overstressed the seriousness of the offences, the interest of the community and the previous convictions of the appellants, as also the finding that there was no hope of reform

14on the part of the appellants. Although the sentence is a heavy one the court a quo on the part of the appellants. Although the sentence is a heavy one the court a quo was not guilty of any misdirection in regard thereto. The evidence indicates that the murder was premeditated and that it was in all probability related to the fact that the Mandrax tablets for which a large sum of money had been paid had not been delivered.

If regard is had to the prior convictions of both the appellants and to the cold-blooded assassination of the deceased the sentence imposed is not "startlingly inappropriate" and does not induce a sense of shock.

In all of the circumstances the appeals of both appellants are dismissed.

RH ZULMAN JA

Howie JA } Concur Harms JA }

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