

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A791/15

01/12/2016

Not Reportable

Not of interest to other judges

Revised

In the matter between:

DOCTOR NGWENYA

Appellant

and

THE STATE

Respondent

Date heard: 28 November 2016

Date delivered: 01 December 2016

JUDGMENT

TSHABALALA. AJ

1. This is an appeal by the Appellant against conviction and sentence handed down in the regional court in Benoni, Gauteng. The Appellant was granted leave to appeal by the Magistrate.

2. The Appellant was convicted of robbery with aggravating circumstances and murder on 3 September 2013. The victim of the aforesaid crimes was Petros Solomon Buda, hereinafter referred to as "the deceased".

3. The appellant was sentenced to 15 years imprisonment in respect of count 1, the offence of robbery. He was sentenced to 20 years imprisonment in respect of count 2, the offence of murder, 5 years of the sentence in count 1 was ordered to run concurrently with the sentence in count 2.

4. The court *a quo* found that substantial and compelling circumstances were not present in this matter. The magistrate therefore imposed a just sentence in terms of the law in the circumstances.

5. The State called seven witnesses. The deceased's brother, Elvis Joseph Buda testified first. Two police officers namely Kitchener T Mabelo, the arresting officer, and Constable Cynthia Khubeka, the officer who was with Mabelo that morning when he effected the arrest. Peter Mathebula, another police officer testified. They were followed by Johannes Makgathla, also a police officer. James Mboya, also a police officer working for the South African Police Service testified. The last witness to testify was Anthony Edward Jones, a police officer attached to the Criminal Record Centre.

6. The deceased's brother, Elvis Buda testified that the deceased dropped him at his place on 6 September 2008 at approximately 21h00. The essence of Mr Buda's evidence is that he reported the deceased missing. The police informed him that a person fitting the description of his brother was found on Sunday morning. The police also informed him that his brother's vehicle was also recovered. Mr Buda also testified that the deceased hated taverns and that he did not visit taverns. Mr Buda also testified that a man who identified himself as Thembinkosi answered the deceased's mobile phone when Nokuthila, Buda's sister called the telephone number.

7. Warrant Officer Mabelo testified that he spotted the accused with a black male walking next to a Volkswagen motor vehicle at approximately 03h30 in the morning of 7 September 2008. Mabelo was accompanied by Constable Khubeka. Mabelo enquired where the Appellant and the other man, Vusi Mabena were on the way to, the Appellant

informed him that they were on their way to procure petrol for the Volkswagen vehicle as the car had run out of petrol.

8. Mabelo searched the Appellant and Mabena, he found a .38 special revolver on the waist of the Appellant. Mabelo arrested them for the possession of an unlicensed firearm.

9. Mabelo realised that the Appellant's sweater and sneakers had blood on them. He enquired from the Appellant about the presence of the blood, the Appellant informed Mabelo that the blood was the result of a nose bleed. Mabelo also noticed blood on the body of the vehicle, when he asked the Appellant for an explanation, the Appellant informed Mabelo that he touched the vehicle when he was bleeding from his nose. Mabelo accepted the explanation given by the Appellant relating to the presence of blood on his person and on the vehicle.

10. The vehicle was left on the street because the police had no right to move it. Mabelo testified that they only saw blood outside but not inside the vehicle. The Appellant and Mabena appeared to have consumed alcohol.

11. Constable Khubeka confirmed the better part of Mabelo's evidence. There were few but important differences, namely that there were traces of blood on the back seat of the vehicle, and at the back of the vehicle, that is outside. Both Mabelo and Khubeka testified that there were no car keys on the ignition of the vehicle.

12. Inspector Peter Mathebula testified that he went to visit the Appellant at Modderbee to fetch the Appellant's sweater because it had blood on it. He noticed that the accused's sneakers had blood on them, he confiscated the sneakers. The Appellant informed him that he gave the sweater to his mother. He booked the sneakers and jersey as evidence.

13. Malafeta Johannes Mogatla testified that he sent the sneakers and sweater to the forensic science laboratory for DNA testing. A sample of blood was drawn from the accused and sent to the forensic laboratory.

14. James Mboya received a firearm from Warrant Officer Mgide and sent it to the forensic laboratory in Pretoria.

15. Anthony Edward Jones took photographs of a Volkswagen Golf vehicle with licence disc [...] MP. He also took photographs of blood in the vehicle, on the side skirting, a panel below the driver's door and the roof pillar to the driver's side of the vehicle. He lifted each drop of blood with a separate swab. He later sent the swabs to the forensic laboratory in Pretoria.

16. The *post mortem* report was handed in by agreement. The Appellant admitted the contents of the report in terms of section 220 of the Criminal Procedure Act. It was read to the record as evidence.

17. The following injuries, amongst others, were noted in the report:

"Multiple fractured ribs, multiple abrasions and bruises over face, chest, upper limbs and abdomen, extensive abrasions posterior chest, head and neck, scalp-thoracic cage and diaphragm - multiple fractured ribs. The cause of death was determined to be multiple injuries".

18. Warrant Officer Haitebatso Sedibe's testimony was of a forensic nature. She made the following findings in her analysis of blood samples and testified that "the DNA results that were found on the deceased was the same as the DNA of the blood that was found on the motor vehicle and the same DNA or the blood that was found on the jersey and takkies of the accused is the same as of the deceased". That was the State's case.

19. The Appellant was the first witness for the defence. He testified that he was drinking with two friends at Shamase Tavern, namely Nhlanhla Ngwenya, a girl and Nkosinathi Sibanyoni, a boy.

20. According to Appellant, he and his two friends were sitting at a corner table. There was a fight inside the tavern, someone fell on top of him, the Appellant stood up and pushed the unknown person. They decided to leave the tavern. The Appellant

accompanied his friends home. He was arrested on his way home without Nhlanhla and Nkosinathi.

21. The Appellant testified that he was alone when he was arrested. He was in possession of two beers when he was arrested. He found another man inside the police vehicle.

22. He denied that he was found in possession of a firearm, and that he was not far from the deceased's motor vehicle. He also denied that they were on the way to procure petrol for the motor vehicle.

23. Appellant denied in his testimony that blood was found on his sweater. He could not recall the order of their sitting. He did not recall the details of the fight, or how the person fell on him. He could not remember whether the person that he pushed was injured as not as the incident took place in 2008. He denied that his sweater had blood on it. He also denied that he killed the deceased or that he was part of the people who killed the deceased.

24. The Court went to inspect the various locations that witnesses had testified about. The first port of call was Shamas Tavern. The accused showed the Court where he was seated. Of importance is that the tables had been changed from movable round tables to fixed tables, during 2008 patrons could easily put their feet under the table.

25. The Court proceeded to the scene where the body was found. The distance was approximately 2.8 kilometres from the tavern. The place had changed as compared to photo 8 in Exhibit N. The Court proceeded to where the VW Golf motor vehicle was found, it was approximately 600 metres from Shamas Tavern.

26. The Court also visited Nhlanhla's place in Simunye Street. The Court estimated the distance from Nhlanhla's place to the Appellant's place to be approximately 100 - 200 metres.

27. Warrant Officer Mabelo had testified that there was no development or house where the vehicle was found. Fikile Futse testified that the scrapyards where she worked

has been there since 2005, the vehicle was found in the vicinity of the scrapyard.

28. The Court established that the distance between the vehicle and the Appellant at the time he was arrested, was 20 paces.

29. Nhlanhla Ngwenya was the second witnesses to testify on behalf of the defence. Nhlanhla was 23 years when she testified. She confirmed the Appellant's evidence. She did not notice blood on the person who fell on the Appellant. She, the Appellant and Nkosinathi were drunk, they had consumed 6 - 8 quarts of beer. They decided to leave the tavern when the fight continued. The Appellant walked Nhlanhla and Nkosinathi to Nhlanhla's house, he then turned back to go to his place. They did not see him again that night.

30. Nhlanhla testified that she did not witness the fight. She did not pay much attention to the people who were fighting. She saw a person fall on top of the Appellant. She could not say which part of his body made contact with the Appellants.

31. Nkosinathi Sibanyoni was the last defence witness to testify. He was 21 years old when he testified. Nkosinathi confirmed the testimony of Nhlanhla in many respects. He went to the Appellant's place looking for Appellant when he was informed that he had been arrested for public drinking. Nkosinathi confirmed the sitting arrangement as confirmed by the Appellant and Nhlanhla. He did not remember the details of the fight or the people who were fighting. He did not see any blood on the sneakers of the Appellant. He testified that the person who fell on the Appellant was full of blood, he had an open wound and blood was oozing from the wound.

32. The defence closed its case after revisiting the scene where the deceased was found and the scene where the motor vehicle was found the second time. The defence attorney was accompanied by the relevant officers who were responsible for the respective scenes.

33. After evaluating evidence the Court decided the only direct evidence that implicates the Appellant to the commission of the crime is the blood of the deceased which was found on his clothes, which means that his guilt must be deduced or

determined on a basis of inferences made from proved facts.

34. The Court concluded that the deceased was never at Shamas Tavern, that the discrepancies of the State's case are not crucial to the outcome of the case. The Court also found the State witnesses to be credible.

35. The Court found the defence's version to be improbable, as a result the Appellant's version was rejected by the Court *a quo*.

36. The only connection between the deceased and the Appellant, in as far as evidence is concerned, is the blood that was found on the Appellant's sweater and sneakers that matched with the blood of the deceased. The Court reasoned by inference that if deceased was not at Shamas Tavern therefore the Appellant was part of the people who robbed and killed the deceased, the blood of the deceased found its way to the Appellant's sweater and sneakers during the commission of the murder and robbery.

37. The Court also concluded that the following facts had been proved:

- 37.1. The deceased died as a result of multiple injuries;
- 37.2. The deceased was found at the open veld;
- 37.3. The DNA results showed that the blood was found on the sweater and sneakers of the accused was that of the deceased or similar to 1 to 2.9 trillion;
- 37.4. Blood stains of the deceased were discovered inside his motor vehicle;
- 37.5. The deceased's motor vehicle was discovered on the street and ultimately parked at SAP13;
- 37.6. The deceased's cell phone was never discovered;
- 37.7. The Appellant was arrested in the early hours of 7 September 2008 in the street;
- 37.8. The Appellant and his friends were at Shama's Tavern at some stage;
- 37.9. The police found an unlicensed firearm;
- 37.10. The Appellant lied when he said the deceased fell on top of him.

38. The Court *a quo* concluded that the deceased was behind the wheel when he was attacked because there were blood droplets inside the car on the driver's side.

There was blood on the roof pillar and side skirt of the car.

39. The Court *a quo* concluded that no other inference could be drawn other than that the Appellant was one of the attackers of the deceased and that Appellant's sweater and sneaker were smeared with the deceased's blood at that stage.

40. This Court agrees that the State witnesses were credible, although they could have gathered evidence better. This Court also agrees that the version of the Appellant is not reasonably possibly true. This Court approaches the appeal from the accepted evidence given by the State.

41. This Court has found itself confronted with the following questions:

41.1. Could the Appellant be in control of the deceased's vehicle without car keys? The vehicle was later removed when the Appellant was in custody.

41.2. Can an inference be drawn that the person who removed the vehicle had the car keys, not the Appellant?

41.3. Can the possibility be discounted that the Appellant occupied the vehicle where it was initially found by police and came into contact with the blood of the deceased in the process?

41.4. If this Court can draw the inference in 41.3 above, can it be said that the only inference that the Court *a quo* could draw is that the Appellant was one of the assailants of the deceased hence he had the blood of the deceased on his sweater and sneakers? In other words more than one inference can be drawn.

41.5. There is no evidence placing the Appellant at the scene where the deceased's body was found. The only evidence that links the Appellant to the deceased is the deceased's blood.

41.6. There is no evidence that suggests that the Appellant knew the person or people who later removed the vehicle from where the police arrested the Appellant.

41.7. I am of the view that another inference can be drawn that the Appellant was not part of the assailants who attacked the deceased, but could have occupied the vehicle later.

41.8. If more than one inference can be drawn relating to the presence of the

deceased's blood on the Appellant's clothes, there is doubt in the State's case.

41.9. Another glaring factor is that the Appellant and or his companion was found in possession of a firearm. The deceased was killed with sharp and blunt objects. It appears like he was stabbed and bludgeoned. The question is why not use the firearm in the possession of the Appellant.

41.10. The Court *a quo* observed that the incident happened a long time ago, that is in 2008, and that people do forget due to time. We are of the opinion that the police had forgotten some of the details because of the passage of time. The defence witnesses were 22, 18 and 16 years old in 2008 respectively. The defence witnesses could not remember most of the events of the night as well.

41.11. I find that more than one inference could be drawn relating to the origin of the deceased's blood on the Appellant's sweater and sneakers. In the premises I find that the State did not prove its case against the Appellant beyond reasonable doubt.

42. The Appellate Division decided that in order to draw an inference one has to follow two cardinal rules of logic. In *R v Blom* 1939 AD 988 at 202 - 2-3 it was held:

"That the inference to be drawn must be consistent with all proven facts and must be the only inference to be drawn. The proven facts should be that they exclude other reasonable inferences from them, save the one to be drawn. If they do not exclude other reasonable inferences then there must be doubt whether the inference sought to be drawn is correct."

43. I am of the view that there is doubt in this matter that the inference drawn by the court *a quo* was correct.

I THEREFORE PROPOSE THE FOLLOWING ORDER:

1. The appeal against both conviction and sentence should be upheld and the conviction and sentence imposed are set aside.

D.B. TSHABALALA
ACTING JUDGE OF THE HIGH COURT

I agree

H.J. DE VOS
JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Ms. M.M.P Masete

Instructed by: Pretoria Justice Centre

For respondent: Adv. C.P Harmzen

Instructed by: The Director of Public Prosecutions