IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A250/2005

DATE: 7 DECEMBER 2007

In the matter between:

JOHN PHILANDER APPELLANT

versus

THE STATE RESPONDENT

JUDGMENT

(Appeal against Sentence and Convictions)

SALDANHA, AJ

The appellant, Mr John Philander, was convicted in the Regional Court in Cape Town on the 3rd of April 2003 for murder and defeating the ends of justice. He was sentenced to 20 years imprisonment on the first count and five years on the second. The sentence on the second count was ordered to run concurrently with that of the first. The appellant was charged together with Mr Morne Williams, who was acquitted on both counts. The appellant now appeals against the conviction and sentence.

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The charge arises out of an incident on the 8th of May 2001 in which the deceased, Mr Nicholas Boltney, was assaulted and strangled near the Maccassar Beach, Mitchells Plain and was subsequently buried in a shallow grave at the Maitland Cemetery in an attempt to conceal the body. It was not established at the trial whether the deceased was in fact dead at the time of the burial. The appellant was legally represented at his trial, he pleaded not guilty to the charges and tendered no plea explanation. The State called three witnesses; Ms Patricia Loggenberg, an accomplice who had been warned in terms of Section 204 of the Criminal Procedure Act, No 51 of 1977; Dr Yolande van der Heyde, a medical doctor who conducted the post-mortem examination on the body, and a police officer, Mr Neville du Toit.

The accused testified in his own defence, and also called a witness, Mr Andwell Thomas. Mr Williams, the second accused, also testified in his own defence.

On appeal the appellant submitted that the magistrate had misdirected himself in relying on the evidence of Ms Loggenberg and that of Mr Williams to the extent that he corroborated her and for finding that his version was not reasonably, possibly true.

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At the outset it is preferable to first deal with the objective evidence of Dr van der Heyde. She had initially not been able to determine the direct cause of death from the post-mortem report examination. She subsequently had access to the police docket and as a result thereof drew up a further report. Some of the chief findings of the post-mortem were that a sock was found in the mouth of the deceased and sand particles were present in the upper and lower airways as well as in the stomach. This suggested aspiration and swallowing. The jawbone of the deceased was fractured on the right side and black shoe laces had been found near the head of the deceased.

In a second report, Dr van der Heyde submitted that the fracture of the jawbone was indicative of a blunt force trauma having been applied to the face. After considering all the information in the docket she described the cause of death as "in keeping with ligature, (strangulation), and the consequences thereof, however smothering due to 'being buried alive and due to his having a sock in his mouth cannot be excluded". She also submitted that the death could have been as a result of a combination of all of these factors. The appellant and Mr Williams admitted the contents of the reports and the various photographs taken of the body, which depicted the extent of its decomposition at the time at which the post-mortem was conducted.

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Ms Loggenberg, a sex worker, testified that she and a colleague, Miss Ronel du Plessis, was in the company of the appellant, his co-accused Mr Williams, and the deceased on the day of the incident. The deceased had been under the influence of alcohol and had driven them around to various places, including shebeens in Delft and Mitchells Plain. At one of the stops the deceased got out of the vehicle alone and she noticed that he had handed over his watch, wallet and ring to another person. In the car she overheard the appellant telling Ms du Plessis to "play the game" as there was an amount of about R2 000 involved. She later understood this to mean that the appellant had planned to rob the deceased of his money.

They subsequently landed up at a deserted part of the Macassar beach near Mitchells Plain. There the deceased was accompanied by Ms du Plessis to nearby bushes where they had sexual intercourse. She had heard the appellant tell Ms du Plessis to ensure that the deceased was completely naked during the intercourse. The appellant thereafter instructed her- Ms Loggenberg - to use the wheel spanner of the motor vehicle to hit the deceased hard over the head whilst he was having sex with Ms du Plessis. He threatened to kill her if she refused. She did so, but out of fear, and hit the deceased lightly over the head. The deceased got up and confronted the appellant and Mr Williams about the assault on him. The appellant immediately

said that they should kill him and took the wheel spanner and beat the deceased over the head and face with it. The deceased fell and the appellant ordered Mr Williams to remove the laces from the deceased's shoes to strangle him with. Ms du Plessis picked up a rock the size of a pumpkin which she threw onto the head of the deceased. Mr Williams also beat the deceased on the head with a rock and both he and Ms du Plessis strangled the deceased with the shoe laces. The appellant had also placed a sock into the mouth of the deceased. During the strangulation the deceased bled through his mouth and ears and gave a sudden jerk whereafter he remained still. The appellant then ordered Mr Williams to bring the car closer and ordered him and Ms du Plessis to put the deceased into the boot of the vehicle.

The appellant instructed Mr Williams to drive to Elsies River where the appellant told friends of his in gangster language that he had killed the deceased. He thereafter got hold of a spade from one of the houses in the area and instructed Mr Williams to drive to the Maitland cemetery. There the appellant and Mr Williams dug a shallow grave in which they buried the deceased. They thereafter went back to Elsies River where they stayed in a flat for approximately a week. She further testified that she was too scared to leave the flat because Du Plessis had warned her that the appellant would track her down and kill her. She had also heard that the appellant and Mr Williams had sold the deceased's

motor vehicle and she noticed that the appellant and Ms du Plessis had struck up an intimate relationship. She was able to escape after a week and immediately went to Kuilsriver where she informed a woman who knew the deceased's wife about what had happened to the deceased. She subsequently accompanied the deceased's wife to the Mitchells Plain police station where she reported the incident.

The appellant confirmed that they were driven around by the deceased on the morning of the incident in Delft and Mitchells Plain. He however denied that he said anything to Du Plessis about being part of a "game", and robbing the deceased before they landed up at the Macassar beach. There by arrangement he had sex with Ms Loggenberg while the deceased had sex with Ms du Plessis. The deceased and Ms du Plessis had taken their time about it and he had become impatient. He and Mr Williams eventually left the beach and walked to a nearby bridge. The deceased and the two women subsequently drove past them. He denied Ms Loggenberg's version about the assault and strangulation of the deceased and the subsequent burial in Maitland. He claimed that he and Mr Williams had eventually landed up at a railway station where they slept. The next morning they went to the house of the deceased where they asked his wife where the deceased was. Her response was that she was not concerned about his whereabouts.

Mr Andwell Thomas, who had been a co-prisoner of the appellant at some stage, testified that he had visited a shebeen one morning which was adjacent to the deceased's house. There he heard the deceased's wife shouting at the deceased and threaten him that she would get people to kill him.

The appellant's co-accused, Mr Williams, had given several versions about the incident and his involvement therein. Eventually when confronted by the prosecutor with a statement which he had made to the police, he admitted that he had removed the shoe laces of the deceased on the instruction of the appellant and together with him strangled the deceased. He had also pulled the car nearer to where the deceased had been assaulted and he and the appellant placed the deceased into the boot of the vehicle. He subsequently drove to Elsies River, on the directions of the appellant, where, after obtaining a spade drove to the Maitland cemetery. He together with the appellant dug a grave in which the deceased was buried. They thereafter stayed in Elsies River for approximately two days and he and the appellant had gotten rid of the deceased's motor vehicle. When he and the appellant returned to Kuilsriver they gave the deceased's wife a concocted story about the appellant having driven away in the crossfire of a gang fight in Mitchells Plain. He

subsequently admitted to the deceased's wife what had really happened to him (the deceased).

The magistrate in his judgment made a thorough evaluation of the evidence of Ms Loggenberg, Mr Williams and that of the appellant. He observed that Ms Loggenberg was a very tense witness, that she had appeared flustered and came across as being fearful. She had even become nauseous when describing the assault on the deceased and had to leave the court. She made an overall positive impression on him and he found her to be a credible witness. He was also mindful though that she had to be dealt with as an accomplice who had been warned in terms of Section 204 of the Criminal Procedure Act, and as she was a single witness, the cautionary rules of evidence also had to be applied. The Magistrate accepted the evidence of Dr van der Heyde as he found no reason to doubt her findings. The evidence of the witness du Toit was of little relevance and not dealt with.

The appellant had failed to impress the magistrate as a witness. He had created a negative impression and tried to bolster his own credibility at the expense of the other witnesses. He was found to have dismally failed in doing so.

Having taken all the evidence into account the Magistrate dismissed the appellant's version as improbable, and found him

to be a dishonest witness. Although the magistrate was sceptical of the credibility of Mr Thomas, his evidence was nevertheless supported by that of the appellant and Mr Williams, with regard to the threats made by the wife of the deceased on the morning of the incident. He however did not find these threats to be of any serious consequence in the matter.

The appellant's co-accused, Mr Williams, who was relatively young appeared to have had a limited education. He was found by the Magistrate to be an outright liar. He was quite happy to change his version as it suited him. As a result of his conflicting versions, the prosecutor literally had to force admissions out of him. He however maintained that he acted out of fear of the appellant, which could have played a role in his testimony. He had also testified that he had been threatened by the appellant in prison not to turn against him. The magistrate correctly observed that the evidence tendered by the State was scant. No evidence was led with regard to the motor vehicle or what had happened to it, or the evidence of the deceased's wife who could possibly have thrown some light on the version of Ms Lochenberg. There was no evidence led with regard to the arrest of both the appellant and his co-accused and no evidence was led with regard to the actual pointing out of the grave site where the deceased's body was found.

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He therefore approached the matter on the basis that he would have to first determine whether the evidence before the court could be relied upon, particularly in the light of the application of the cautionary rules to the evidence of both Ms Loggenberg and Mr Williams. The version of the appellant would also have to be considered to determine whether it was reasonably possibly true. The magistrate correctly pointed out the approach with regard to a single witness is that the evidence would have to be satisfactory in all material respects or be corroborated by other evidence. He pointed out that the most significant criticisms against the evidence of Ms Loggenberg were in two respects; firstly, with regard to her evidence in chief, in which she claimed that she was scared of the appellant, but had made no mention that she had heard that he had a firearm until it came out in cross-examination. Secondly, her version with regard to the assault on the deceased with the rock. She initially stated that both Ms du Plessis and Mr Williams had assaulted the deceased with rocks. Later in cross-examination she claimed that Ms du Plessis had merely thrown the rock aside and did not hit the deceased with it. On this contradiction she was confronted with her statement to the police in which she had said that Ms du Plessis had in fact hit the deceased with the rock. She also contradicted herself at times with regard to whether Williams was a willing partner to the appellant in the incident. He regarded the contradiction with regard to the rock as the most significant. It

could not simply have been a mistake on her part, and he was of the view that he could therefore not find that her evidence was satisfactory in all material respects. In this regard her evidence would have had to be corroborated if it was to be relied upon. He found that her version was supported in various respects, in particular that they had been driven around by the deceased on the day of the incident, the findings of the post-mortem with regard to the broken jawbone of the deceased, which was consistent with her version of the assault on the deceased, and the shoelaces that were found near the deceased's body. The finding of the sock in the mouth of the deceased also supported her version, and so did the fact that the deceased's body was found in a grave in Maitland.

Despite the magistrate having found that Mr Williams was not a credible witness his version with regard to the instruction by the deceased to remove the shoelaces and the strangulation of the deceased supported that of Ms Loggenberg. Further his evidence with regard to the instruction by the appellant to bring the car nearer at the scene, the placing of the deceased into the boot, the visit to the gangsters in Elsies River, and the subsequent burial of the deceased in Maitland all supported Ms Loggenberg's version.

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Mr Williams also confirmed that they had stayed in a flat in Elsies River after the incident, although his version was that it was only for two days, rather than the week referred to by Ms Loggenberg. Mr Williams also testified that Miss Lochenberg appeared to have been acting under duress and in fear of the appellant and that he himself had also been scared of the appellant.

The magistrate also considered the improbabilities of the appellant's version, in which he claimed that both he and Mr Williams were not present during the assault and the burial of the deceased. Mr William's version that he had pointed out the burial place to the police was not challenged and put paid to the claim by the appellant that he and Mr Williams had left the deceased and the two women at the Maccassar beach. The magistrate found that there was sufficient corroboration to accept the evidence of Ms Loggenberg, despite the apparent contradictions in her evidence.

I am satisfied that the approach adopted by the magistrate accords with that set out by Schreiner, JA in the matter of R v Ncanana 1948(4) SA 399 at 405 – 406;

> "What is required is that the trier of fact should warn himself or if the trier is a jury that it should be warned of the special danger of convicting on

> the evidence of an accomplice; for an accomplice is not rarely a witness with a possible motive to tell lies about an innocent accused, but is such a witness peculiarly equipped by the reason of its knowledge of the crime to convince the unwary that his lies are the truth."

In this regard see also the dicta of De Villiers, JP in R v Mkwena 1932 [OPD] 79 at 80;

> "The uncorroborated evidence of a single witness is in no doubt declared to be sufficient for conviction by Section 284 of the Criminal Procedure Act, but in my opinion that section should only be relied upon where the evidence of a single witness is clear and satisfactory and in every material respect."

In S v Hlapezula and Others 1965(4) SA 349, [AD] at 440 Holmes, JA remarked as follows:

> "Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond the reasonable

doubt and this depends on an appraisal of all the evidence and the degree of the safeguards aforementioned."

It is clear from the detailed analysis by the Magistrate of the evidence of the witness, Ms Loggenberg, and that of Mr Williams, that he approached their evidence with the necessary caution and applied the appropriate safeguards in dealing with it. I am also mindful that a Court of Appeal will not lightly interfere with the findings of credibility and the observations of a trial court. In this regard see R v Dhlumayo and Another 1948(2) SA 677, [AD] in which Davis, Acting JA commented as follows;

> "An Appellate Court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all embracing, and it does not necessarily follow that because something has not been mentioned therefore it has not been considered."

In the circumstances I am satisfied that the Magistrate had correctly accepted the evidence of Ms Loggenberg and to the extent to which it had been supported by that of Mr Williams. He d also correctly found that the version of the appellant was not

reasonably possibly true. In the result the APPEAL AGAINST THE CONVICTION IS TO BE DISMISSED.

AD SENTENCE

A Court of Appeal will only interfere with the sentence of a lower court if it finds that;

> "the reasoning of the trial court is vitiated by misdirection or where the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock....."

S v Kgosimore 1999(2) SACR 238, (SCA) at 241 E-G.

The appellant testified in mitigation of sentence and submitted that the Court should take into account the alleged sexual abuse by his own father on him at a tender age. Both the appellant's mother and his sister also testified in mitigation of sentence as well as an erstwhile fellow prisoner of the appellant, Mr C J Pharow. The magistrate had also taken into account that the appellant had at least 17 previous convictions for various offences ranging from theft, housebreaking, escaping from custody, possession of arms, malicious damage to property and possession of drugs which had taken place over a period in excess of 16 years. Some of these offences it appears were committed by the appellant while in custody. The magistrate

correctly found that the appellant had been convicted of a serious offence. In fact from the evidence before the Court, and in particular the photographs this appears to be a gruesome killing, more so as the deceased might still have been alive when buried. The abuse by the appellant of the witnesses, Ms Loggenberg, Ms du Plessis and his co-accused in the commission of this offence was also regarded as an aggravating factor.

The magistrate had taken into account the personal circumstances of the appellant, and that he had been in custody for a lengthy period awaiting trial. So too did he consider the evidence of the appellant's family and friend. In order to temper the cumulative effect of the sentences he ordered that the sentence on the conviction of the defeating of the ends of justice should run concurrently with that of the murder.

In the circumstances, having regard to the proper considerations to be taken into account with regard to sentence, and the purpose of sentence I am satisfied that the magistrate had not misdirected himself. In the result the APPEAL AGAINST SENTENCE ALSO STANDS TO BE DISMISSED.

I propose to make the following order;

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1. The APPEAL AGAINST BOTH THE CONVICTION AND SENTENCE IS DISMISSED.

2. The conviction and the sentence is upheld.

V C SALDANHA, AJ

Hlophe, JP: I agree. It is so ordered.

J M HLOPHE, JP

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