IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A482/2007

DATE: 7 MARCH 2008

In the matter between:

HAPPY BONGANI SKATE Appellant

and

THE STATE Respondent

J U D G M E N T

OOSTHUIZEN, AJ:

[1] This is an appeal against the conviction and sentence of the appellant, the details of which will be given presently. Before dealing with the merits of the appeal it is perhaps necessary to mention two ancillary matters.

[2] The heads of argument on behalf of the appellant were initially drawn by Mr Pitlele in October 2007, he having at that stage been instructed to argue the appeal on behalf of the appellant. Mr Pitlele commenced pupilage at the local Bar in January 2008. In terms of the Rules of the Bar which he joined he was thus precluded from appearing in appeals, or indeed in any other matters, without the requisite permission of the Bar Council.

Although he was aware of that fact, Mr Pitlele delayed the handing over of this particular matter until Wednesday 5 March, 2008, when he entrusted the arguing of this appeal to Mr Ramovha who appeared before us this morning.

[3] That delaying in the handover of the matter until virtually the eve of the hearing of the appeal is most unsatisfactory. The record before us runs to almost 280 pages and it would have placed counsel taking the appeal over in an untenable position to have to go through that record, consider the heads of argument, consider the applicable legal principles and argue the matter properly on extremely short notice.

[4] In the circumstances in which the appellant's erstwhile counsel found himself, namely having commenced pupilage and therefore being unable to deal with the matter, he was duty bound to make timeous arrangements to entrust the appeal to another counsel so that his client would not be prejudiced. This was not done in the instant matter. Fortunately, Mr Ramovha did, notwithstanding the burden placed on him, have the opportunity of going through the record and was able to argue the matter adequately this morning. The appellant

was also contacted in the course of last week, told what the situation was and consented to Mr Ramovha appearing on his behalf so that ultimately the particular aspect presents no practical difficulties. However, the unacceptability of Mr Pitlele's conduct in the circumstances needs to be emphasized.

[5] Secondly, part of the record appeared to have been omitted in that there was no indication in the typed transcript that one of the witnesses, a Mr Matuma, had completed his evidence. We were, however, taken through the record and given the assurance by counsel that all the sequence numbers of the recording tapes reflected that there were no omissions from the record. This much was agreed by both counsel for the appellant and for the respondent. The matter was argued, in our view correctly, on the basis that the transcript before us does indeed accurately represent all the evidence that was led in the court below.

[6] Turning to the merits of the appeal. On 27 April 2002, Mr Maboyana (hereinafter referred to as "the deceased") was shot in the head with a firearm. He sustained two gunshot wounds as a result of which he subsequently died. The appellant was charged with his murder and

certain statutory offences relating to possession of a firearm and ammunition. He was found guilty and sentenced to 15 years' imprisonment in respect of the murder and seven years in respect of the statutory offences, the sentences to run concurrently.

[7] The shooting in question took place at a shebeen known as Geraldine's Place in Phumlani Village. It was common cause between all those present at the time of the incident that the perpetrator walked up to the deceased and, without prior provocation or altercation, fired the two fatal shots, an action suggestive of a gangland style execution. All the relevant witnesses agreed that the deceased and the appellant were earlier and prior to the shooting both inside the shebeen, as were approximately 30 to 50 other people. At a stage the deceased left and went to an adjoining property to relieve himself. On returning he was approached by the perpetrator and shot, as already described.

[8] The central dispute in the appeal is this. The State's witnesses identify the appellant as the perpetrator of the shooting. The appellant testified that, at the time that the shots were fired, he had remained inside the shebeen and that he was still there when he heard the shots and

went out thereafter. At that stage the deceased had already been wounded and had fallen to the ground. The appellant was corroborated in that evidence by four other witnesses.

[9] Two witnesses were called by the State. It is sufficient to briefly summarise their evidence. The first witness, one Blom, described how the deceased, on returning from the adjoining yard having relieved himself, was approached by the appellant. The appellant, without saying anything, then shot the deceased. The shots were fired from a .38 calibre revolver which the appellant took from the front of his trousers and after shooting returned the revolver to the same place. At the time of the shooting, Blom was standing outside the house with one Andile Mene. Following the shooting many of the people that were in the shebeen came from outside to observe and find out what had happened. Blom and Mene were cousins and were both friends of the deceased.

[10] Andile Mene confirmed that he had been standing outside the shebeen, and that at some stage the deceased went away to relieve himself. Shortly thereafter Mene heard his name being shouted. He turned around and saw the

deceased already fatally wounded, falling to the ground. There was a juke box playing loud music at the time which may account for the fact that Mene was unable to say anything, in his evidence, about the firing of the shots. Mene then saw Blom shouting at the appellant, asking why the appellant had shot the deceased, to which the appellant did not reply. Mene's evidence was that the appellant was, at the time of the shooting, the only person near the deceased, and that the appellant had a white cloth wrapped around his hand.

[11] Mene conceded that the relationship between himself and Blom on the one hand, and the appellant on the other, was not on a good footing, arising from the fact that the appellant had been romantically involved with Mene's sister. Mene and his family did not approve of this, as the romantic involvement had had certain adverse consequences for the sister's high school education. It was common cause between the witnesses that, shortly after the shooting, the police arrived at the scene and that the appellant was still present when they arrived there.

[12] The appellant testified and, as already stated, called four witnesses. The effect of their evidence is that the

appellant was seated at a table inside Geraldine's Place with three or perhaps four other persons. While seated there appellant and his witnesses heard the two shots fired. They went outside and saw that the deceased had fallen to the ground. The appellant testified that he neither saw the person who fired the shots, nor knew at the time who it was. He confirmed the evidence regarding the romantic relationship which he had with Mene's sister. He testified that he does not own, and has never owned, a firearm and does not know how to use one. This evidence was unchallenged in cross-examination.

[13] The law is clear that the *onus* is on the State to prove that there is no reasonable possibility that the defence which is put up is true. This has to be decided, not in a piecemeal fashion, separately considering the evidence on behalf of the State and the defence, but viewing the evidence as a whole. The conclusion which is reached as to the guilt or innocence of the accused has to take into account all the admissible evidence before the Court (see S v Van Aswegen 2001(2) SACR 97 (SCA) at 100f-101f; S v Van der Meyden 1999(1) SACR 447 (W) at 449g-i).

[14] It is difficult to follow from the judgment delivered in the court below on what basis the magistrate found that the

evidence put up by the defence could not reasonably possibly be true. The magistrate commented that the two State witnesses had given their evidence impressively but that, of course, in itself is not a sufficient ground for finding that the defence cannot reasonably possibly be true. In the judgment the magistrate makes the comment that the appellant's version was "riddled with inconsistencies and improbabilities" but her judgment does not elaborate on what those inconsistencies and improbabilities were in any particularly helpful manner. She finds that the appellant's version is "totally different from the State's version" but that would of course, in view of the defence put up, of necessity be so.

[15] The key factor to the determination of the appeal is that the appellant testified quite adamantly that he was inside the shebeen when the shots were fired, that he had not fired the shots, that he did not own and did not know how to use a firearm. These aspects were scarcely challenged in cross-examination. There is no reason, on my reading of the record, to reject this evidence, particularly given the absence of cross-examination. It is well established law that it is the duty of a cross-examiner to put to the person testifying not only facts, but also imputations, on the strength of which it will be

contended that the evidence given by them falls to be rejected. That was not done in the case of the appellant. A perusal of the record will show that his evidence, particularly on the important aspects that I have just mentioned, remained virtually unchallenged.

[16] It is so that there are certain unsatisfactory aspects in the evidence of the corroboratory witnesses that the appellant called. There is, for example, the fact that two of them stated that they knew who the perpetrator was. If that was so one would have expected others present at the time to have seen the assailant and be able to identify him to the police when they arrived at the shebeen. Surprisingly no sort identification occurred. It is also true that there were various contradictions between these witnesses as to how much time elapsed between the shots being fired and the crowd exiting the shebeen. There were various contradictions between the order in which persons existed from the shebeen and various other aspects, but these are aspects of lesser importance given the confusion which would undoubtedly have reigned after everyone inside the shebeen had heard the shots ringing out.

[17] Even if one properly considers all of the contradictions or apparent contradictions in the evidence of the

corroboratory witnesses, it has been often held that the fact that an accused person gives false evidence is not necessarily an indication that they are guilty of the offence (see for example S v Jonathan 1987(1) SA 633 (A) at 648H-648C). The same must undoubtedly apply where it is found that corroboratory witnesses called by the defence have given evidence which is not truthful.

[18] On the other hand, there are, to my mind, a number of factors which, properly considered, do not assist the State. There is, for example, the fact that there was bad blood between Blom, Mene and the appellant arising out of the romantic relationship to which I have already referred to. This might constitute a reason for these witnesses to have fabricated evidence against the appellant. Then there is the fact that there is nothing in the evidence which would account for the appellant in cold blood and unexpectedly walking up to the deceased and shooting him through the head in the manner described by Blom. I have already mentioned that what happened is suggestive of a gangland style execution, but there was no evidence that the appellant was at the time involved in any gang activities. There was no evidence that he had any difficulties or arguments or altercations with the deceased on the evening in question

or at any prior time. There was no evidence that the appellant was intoxicated, angry or in any other mood which would account for a murderous assault of the kind which occurred.

[19] There is the further aspect that 10 days elapsed between the incident and the appellant's arrest. According to the evidence, in particular that of Mene, he knew that it was the appellant that had perpetrated the deed and would have been in a position to convey that fact, to the police when they arrived at the scene, or at latest when Mene went to the police station shortly thereafter to report what had happened. It is thus inexplicably strange that ten days would have elapsed between the offence and the arrest of the appellant.

[20] Having regard to these factors and a number of others and, in particular, to the overall important factor that the *onus* rests on the State and that the State, in my view, has not shown that the evidence put up by the appellant cannot reasonably possibly be true, I am of the view that the appellant was incorrectly convicted. I am of the view that the State did not discharge the *onus* resting on it. That being so, the proper finding in the court below should have been the acquittal of the appellant.

[21] I would accordingly uphold the appeal and set aside the conviction and the sentence.

OOSTHUIZEN, AJ

MOOSA, J: I agree. The appeal succeeds, the convictions and sentence are set aside. Appellant is found not guilty and acquitted on all the charges.

MOOSA, J