Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: A292/09

In the matter between:

MOEGAMAT YUSUF ABADER Appellant

and

THE STATE Respondent

MINORITY JUDGMENT DELIVERED ON 26 APRIL 2010

FORTUIN, AJ:

INTRODUCTION

[1] The appellant, Mr Moegamat Yusuf Abader, together with his co-accused in the lower court, Mr Abdulatief Abrahams, were charged with murder in the Regional

Court, Cape Town. Mr Abrahams was acquitted and Appellant was convicted of murder. Appellant was referred to this Court for sentencing in terms of Section 52 of Act 105 of 1997. On 13 March 2008, Motala J confirmed the conviction and sentenced Appellant to 18 (eighteen) years imprisonment. He now appeals against his conviction.

FACTUAL BACKGROUND

[2] For purposes of easy reference, Appellant will be referred to as the accused ("the accused") in this judgment. The undisputed facts are that on 1 October 1999, Mr Ebrahim Satardien (the deceased) and his friend, Ms Majal, had been sitting in the deceased's motor vehicle in front of Ms Majal's house in Grassy Park. At approximately 22h00, two unidentified men approached the vehicle and asked to borrow a cigarette lighter from the deceased. The deceased obliged. Shortly thereafter, the deceased was killed by gunshots fired by the two men. Ms Majal could not identify any of them.

[3] The police collected a total of fourteen items during the post-mortem and at the scene of the crime respectively. Ten bullet heads and metal fragments were recovered from the deceased's body and three spent cartridges and the deceased's cigarette lighter were collected at the crime scene.

[4] It was the state's case that the fire-arm, belonging to the accused and in safe-

keeping with his father-in-law, Mr Abrahams, was one of the firearms used to fire the shots that killed the deceased. Furthermore, the accused left the *Eat and Treat* function that he attended in Athlone on the night in question for a period of approximately 23 minutes, drove to Grassy Park, committed the murder, and drove back to the function.

[5] The accused maintained that he locked his fire-arm in the safe at his father-in-law's house, because he did not want to attend the public function with the fire-arm visible to the public. It is further his case that he remained at the function from 18h30 until after midnight that evening. During cross-examination in the Regional Court, the accused conceded that it was possible for him to leave the function and to return within a period of approximately 23 minutes.

[6] It was submitted on behalf of the accused that the police tampered with the evidence, contaminated the scene, and in general tried to frame him in order to get to his father.

[7] In confirming the conviction, Motala, J found that the magistrate did not misdirect herself in any respect and that the proceedings of the magistrate's court were in accordance with justice.

[8] The grounds of appeal are that the Court ought to have rejected the forensic evidence, which was irreconcilable with the direct evidence provided by the

defence. On behalf of the appellant it was also submitted that the Court ought to have accepted the appellant's alibi evidence as reasonably possible true. It was submitted further that he could not absent himself unnoticed for a period of 23 minutes from the function at which he officiated. It was further submitted, on behalf of the appellant, that the court ought to have drawn an adverse inference from the state's failure to call the five alibi witnesses.

[9] Accordingly the issues to be determined are as follows:

9.1 Whether the ballistics expert's opinion linking the spent cartridges to the accused's firearm, a 9mm C2 pistol with serial number V7933, was correct;

9.2 Whether the accused's alibi evidence is reasonably possibly true; and

9.3 Whether the accused's guilt is the only reasonable inference to be drawn from the circumstantial evidence.

THE APPLICABLE LAW

A. EXPERT EVIDENCE

[10] *In casu*, the only evidence linking the accused to the crime is the ballistic evidence. The nature of expert evidence in criminal cases like the present one was discussed in **S v Nthati en 1 Ander** 1997(1) SACR 90 OPA, where Cilliers J stated as follows:

"Deskundige getuienis behoort hul ondersoeke met die grootste mate van

noukeurigheid en sorgsaamheid te verrig veral in strafsake waar die skuld aldan nie van 'n beskuldigde dikwels grootliks en soms uitsluitlik afhanklik is van die getuienis van so 'n deskundige."

B. <u>ALIBI</u>

[11] The accused offered an alibi in defence to the charge against him. The law relating to alibi evidence is trite. The onus is on the State to prove that the accused committed the offence. The onus upon the State does not shift where an accused raises the defence of an alibi. This is illustrated by the following extract from Schmidt, **Bewysreg 4de uitgawe**, p142:

"Vandag word tereg aanvaar dat 'n alibi nie 'n soort spesiale verweer is wat deur die beskuldigde bewys moet word nie. Die Staat moet bewys dat die beskuldigde die misdaad gepleeg het en moet derhalwe die alibi weerlê, en die alibi skep nie 'n geskilpunt wat afsonderlik beoordeel moet word nie."

[12] Alibi evidence should also not be considered in isolation, but in the light of the totality of evidence. In this regard the court in **R v Hlongwane** 1959(3) SA 337 (A) 341A, said the following:

"The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses."

C. CIRCUMSTANTIAL EVIDENCE

[13] In *casu*, it is common cause that we are dealing with circumstantial evidence. The legal approach with regards to circumstantial evidence is stated as follows in the well-known decision of **R v Blom** 1939 AD 188 at 202-203:

> *"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

D. LYING WITNESS

[14] The law relating to a lying witness is trite and should also be emphasized. Our courts do not deduce the guilt of an accused from a mere lie. Hoexter JA in **S v Steynsberg** 1983 (3) SA 140 (A) at 146 C-D approved of a dictum of Greenberg JA in **Goodrich v Goodrich** 1946 AD 390:

> *"...one shall be careful to guard against the intrusion of any idea that a party should lose his case as a penalty for perjury."*

E. THE TEST IN CRIMINAL CASES

[15] The question that needs to be answered ultimately is whether the alibi of the accused is reasonably possibly true and the State has proved its case beyond

reasonable doubt. Given the argument of Mr van der Berg, who appeared on behalf of the accused, that this court should not discount the accused's alibi, it is as well to remind ourselves that proof beyond reasonable doubt does not mean proof beyond any shadow of a doubt. Furthermore, the test requires a consideration of the cumulative effect of all the evidence and not a piecemeal approach. In **S v Trainor** 2003(1) SACR 35 (SCA) at 41b, Navsa JA applied this principle as follows:

> "*A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any.*"

[16] The decision in **S v Van der Meyden** 1999 (1) SACR 447 (W) at 449h–450b, endorsed in **S v Van Aswegen** 2001 (2) SACR 97 (SCA) 101c-e, is also instructive in these disputes. Nugent J said the following:

> "*A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence ... The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning*

which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

APPLICATION TO THE FACTS

EXPERT EVIDENCE

[17] An overview of the ballistic evidence is as follows: Constable Wayne Petersen ("Petersen"), the first policeman at the scene, picked up a 9mm cartridge shell near the deceased's car and handed it to Captain Tolmay ("Tolmay"), the first investigating officer at the scene. Tolmay confirmed that the cartridge shell was handed to him by Petersen. He further testified that he found two more shells, one outside and one inside the car, and two bullet points, also inside the car. All these items were photographed before he took possession of them.

[18] He took all the exhibits to his office and locked them in a steel cabinet for safe-keeping over the weekend. On Monday, 4 October 1999, he booked the exhibits into the SAP13 register at Bellville Police Station. He immediately thereafter retrieved the items, packaged, sealed and marked them and hand delivered them to the ballistic unit.

[19] With regard to the firearm, Inspector Swart ("Swart"), on 3 July 2000, nine months after the incident, arrested the accused at the home of Mr Abrahams, where he resided. Swart was accompanied by Superintendent Barkhuizen ("Barkhuizen"), who, at the time, was the Commander of a unit called "*Crimes against the State*". The accused handed over his 9mm pistol with serial no V7933 to Swart who, in turn, stored the gun in a safe at Barkhuizen's office to which only he had the key. On 5 July 2000, Swart booked the firearm in the SAP13 register at the Police Station, booked it out again immediately and took it to the ballistics unit.

[20] A dispute about the whereabouts of the firearm for a period of five days was explained by Barkhuizen. The question that arises here is how this fact contributes to the conspiracy theory advanced by the defence. It should be borne in mind that the shells used in the ballistic tests were the same shells handed in to the ballistic unit on 4 October 1999, the date of the incident. At this stage, the police did not have possession of the accused's firearm. Barkhuizen's evidence about the safe-keeping of the firearm in his office before it was handed to the ballistics unit was clear; he was the only one with a key to the safe in his office and that, over that period, the firearm was only removed twice by Swart, once to be registered into the SAP 13 and once to be taken to the ballistics unit. As a result, I am not persuaded that the five day period in question, in any way, points to the police tampering with the accused's firearm.

[21] I now turn to the evidence of the ballistics expert, Inspector Gerber ("Gerber"). Gerber has been attached to the ballistics unit since 1994. He testified that one of the shells found on the scene was fired from the accused's firearm. He came to this conclusion by comparing the impressions made by the firing pin in the slide of the firearm with markings on the test bullet. He could not determine whether the shell was fired from the barrel of the accused's firearm. The serial number on the barrel differed in appearance from the serial number on other parts of the firearm. He was of the opinion that the barrel was modified after the shooting of the deceased. His opinion was supported by a handwriting expert, Yvette Palm.

ALIBI

[22] In the present case, the alibi evidence of the accused could reasonably possibly be true. This alibi evidence should be considered together with all the other evidence. Inspector Speeds's evidence that he had statements from people who attended the function confirming that the accused was there for an uninterrupted period cannot be ignored. In line with the decision in **S v Van der Meyden** and **S v Van Aswegen,** supra, all of the evidence should be considered, including that of Inspector Speed, a state witness, corroborating the accused's alibi evidence. The accused's evidence that he did not know the deceased personally and that he did not know where the deceased's friend, Ms Majal lived, was also not disputed.

[23] Inspector Speed testified in the Regional Court that he interviewed the people whom the accused hosted at the *Eat and Treat* function that evening. He further testified that all five of them confirmed that the accused was at the function for the whole evening and that he would not have been able to absent himself for 20-30 minutes without them noticing. This evidence by inspector Speed, even though it is hearsay, was never objected to. This was also the accused's version from the outset and it was his evidence at the trial. The accused failed to call these witnesses. In **S v Van Eck** 1996 (1) SACR 130 A it was stressed that the state must present and prove strong compelling evidence to the court and that this is done by presenting witnesses who place the accused at the scene of the crime. There is no duty on the accused to prove an alibi. In this matter, similarly to the Van Eck case, the fact that the accused did not call the alibi witnesses, should not be held against him. The fact that the accused during cross-examination conceded that it was possible for him to travel the distance between the Athlone Civic Centre and murder scene, does not mean that he did make the journey on the night and it does not mean that he fired the shots that killed the deceased. It also does not exclude the possibility that someone else, in particular Mr. Abrahams, who at all material times was in control of the firearm, may have used his firearm. The fact that inspector Speed did not investigate whether Mr. Abrahams could have travelled the distance between his house and the crime scene with the same vigour that he investigated the possibility with regards to the accused should not prejudice the accused. The onus does not shift and remains

on the state to prove that the accused's version is to be rejected because it is not reasonably possibly true.

[24] In considering the alibi evidence, it cannot be excluded that the accused was elsewhere at the time of the murder. The fact that an accused does not have to prove his alibi does not mean that he may not need to present evidence which may support the alibi. In the end, the test is still whether, in view of the totality of the evidence, the state proved its case beyond reasonable doubt and whether the accused's version is reasonably possibly true. In **S v Ngcina** 2007 (1) SACR 19 SCA, the following was said:

> *"Dit is nie nodig dat die verhoorhof die beskuldigde se getuienis moet glo nie, maar as daardie getuienis redelik moontlik waar kan wees dan kan 'n skuldigbevinding nie volg."*

[25] At no stage during the proceedings in the court *a quo* did the accused, nor his witness, hint during their evidence that a third party could have used the firearm. On the evidence this court must accept the evidence about the firearm not being under anyone else's control, except Mr. Abrahams and the accused and that it was indeed the accused's firearm that was used. Thus, when a determination is made about whether the accused fired the shots, the accused is compelled to rely exclusively on the alibi evidence which, in line with the decision in **R v Hlongwane** supra, shall be considered in the light of the totality of the evidence.

CIRCUMSTANTIAL EVIDENCE

[26] An independent evaluation of all the surrounding circumstances in the present case shows the following:

a. The accused, together with his witness Mr Abrahams, insisted that the weapon was under Mr Abrahams' control at all material times. At no stage during their evidence was there any possibility left open that a third person may have used the firearm at the time of the incident. This evidence removed the possibility of a reasonable inference that a third person may have used the firearm while the accused was at the *Eat and Treat* function. If the court accepts this evidence by the accused, together with the evidence by Mr Abrahams, any possibility of anyone else, save for the accused or Mr. Abrahams, using the firearm at that time, is excluded.

b. The ballistic evidence was disputed by the accused. The basis of the dispute is that the crime scene was contaminated and that there was a conspiracy by the police to implicate the accused and/or his father. Both the Regional Court magistrate and Motala J rejected the submissions concerning a possible conspiracy by the police. For this submission to succeed, it would have been necessary for the defence to show that the state-witnesses colluded with each other. It would further have been necessary to show that the police planned the placing of shells on the scene almost a year before the accused's firearm was in their possession. The chances of the police going to all this trouble to plan the

contamination of the scene so meticulously are remote, to say the least. In the absence of this conspiracy theory, I have no doubt that the acceptance of the ballistic evidence by the courts *a quo* was correct.

LYING WITNESS

c. If this court accepts the ballistic evidence, it must follow that both the accused and his witness lied about the whereabouts of the firearm. The question that then has to be answered is why they lied. A few possibilities were mooted by Mr van der Berg, i.e. that they lied to protect Mr. Abrahams, they lied to protect a possible third person or they lied to protect the accused. However, if they had to protect a third person, it is improbable that they would continue lying, even when this lie implicated the accused. Many opportunities were created for both of them to give the name of a possible third person, if indeed there was someone else. They never availed themselves of this opportunity, and, in fact, they never even raised this possibility in evidence. This leaves me with the following plausible conclusion: they lied to protect the accused, or they lied to protect Mr. Abrahams. It should be borne in mind that on their own versions, they are the only two persons who had access to the firearm. During evidence Mr. Abrahams maintained that the firearm was under his control at all material times. As stated earlier, if this court accepts the ballistic evidence, it must follow that Mr. Abrahams also lied. The fact that

the accused lied, however, does not mean that he fired the shots that killed the deceased.

THE TEST IN CRIMINAL CASES

[27] The test that the court had to apply was whether the accused's guilt was established beyond reasonable doubt. The conclusion one draws from this is that an accused is entitled to be acquitted if it is reasonably possible that he might be innocent. In this regard see **S v Van der Meyden**, *supra* at 448f. At 449b, Nugent, J spells out the role of a criminal court as follows:

> *"... the conclusion of a criminal court is not to be reached merely by choosing what it considers to be the better of two competing versions (*Hlongwane's *case* supra *at 341A;* S v Singh *1975 (1) SA 227 (N). Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true – the one is possibility true only if there is an equivalent possibility that the other is untrue."*

[28] *In casu* the courts *a quo* were faced with such competing versions, i.e. the state's version that the accused shot the deceased and the accused's version that he

was at the Eat and Treat function at the time of the murder. There is a reasonable possibility that the accused was at the function for the duration of the evening which excludes any possibility that he could have fired the shots. In addition, the court was presented with evidence that someone else, Mr. Abrahams, had the firearm under his control for the duration of the evening.

[29] The difference between these two tests was also discussed in **S v Jaffer** 1988 (2) SA 84 where the decision in **S v Singh** 1975(1) SA 227N was discussed at 88H-I:

> *"... the proper approach was for a court to apply its mind not only to the merits and demerits of the State and the defence witnesses, but also to the probabilities of the case. This was to ascertain if the accused's version was so improbable as not reasonably to be true. This, however, did not mean a departure from the test as laid down in **R v Difford** 1937 AD 370 at 373 that, even if an accused's explanation be improbable, the court is not entitled to convicts unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."*

[30] The court in **S v Jaffer**, *supra*, at 89B also referred to **S v Kubeka** 1982 (1) SA 534 (W) where the onus on the state was stated as follows at 537F-H:

> *"Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him*

if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus *on the state."*

[31] The following quotation from **S v Jaffer**, *supra*, at 89D is worth repeating:

"I agree. The test is, and remains, whether there is a reasonable possibility that the appellant's evidence may be true. In applying that test one must also remember that the court does not have to believe her story; still less has it to believe it in all its details. It is sufficient if it thinks there is a reasonable possibility that it may be substantially true."

[32] In a later SCA decision, **S v Shackell** 2001 (4) SA 1 (SCA) at 12H – 13D, Brand AJA said as follows:

"... It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail if an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. ..."

[33 I am of the view that the court *a quo* misdirected itself and, as discussed in **S v Van der Meyden**, *supra*, chose the better of the two versions instead of applying the required test.

CONCLUSION

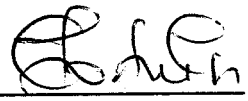
[34] I am satisfied that the experts in this matter performed their investigation to a large extent with precision and carefulness. I am in agreement with Motala J's finding that the accused's gun was used in the shooting of the deceased. There is no plausible evidence, nor argument to gainsay this conclusion. Whether the accused fired the shots is, however, in my view, a different issue. The fact that it was his gun does not in itself justify the conclusion that he fired the shots. Whether he was the one who fired the shots should also be proved beyond reasonable doubt.

[35] The totality of the evidence in the light of which alibi evidence in this case should be considered is the following: the accused's firearm, which was under his control or under the control of his father-in-law, fired the shots that killed the deceased; the accused and his witness lied about the location of the firearm; no reasonable alternative version was presented as to a possible third person who could possibly have used the firearm; the accused maintained from the outset that he was at the *Eat and Treat* function for the duration of the evening and

stuck to this version when he testified; he provided the names of witnesses who placed him at the function; these witnesses provided statements to the police confirming the accused uninterrupted presence at the function; even though these witnesses were not called to testify, this version was corroborated in evidence by Inspector Speed, a state witness.

[36] In my view, the cumulative effect of all the circumstantial evidence constitutes sufficient proof that the accused's version is reasonably possibly true and that the accused's guilt was not proved beyond reasonable doubt.

[37] In the circumstances, the appeal is granted and the conviction and sentence is set aside.



FORTUIN, AJ