**IN THE HIGH COURT OF SOUTH AFRICA**

**(TRANSVAAL PROVINCIAL DIVISION)**

Date: 2009-02-06

Case Number: A306/2007

UNREPORTABLE

In the matter between:

**AARON TSHOSANE** Appellant

and

**THE STATE** Respondent

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**JUDGMENT**

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**SOUTHWOOD J**

[1] On 10 June 1998 the appellant, and his co-accused, Lucas Kgotsatso Mokoena ('Mokoena'), respectively accused no 1 and accused no 2 in the court *a quo*, were each convicted in the Vereeniging Circuit Court (per J.C. Claassen J sitting with an assessor) of murder, contravening section 2 of Act 75 of 1969 (unlawful possession of a firearm) and contravening section 36 of Act 75 of 1969 (unlawful possession of ammunition). The court *a quo* sentenced the appellant and Mokoena each to 25 years imprisonment for the murder, 3 years imprisonment for the unlawful possession of the firearms and 2 years imprisonment

for the unlawful possession of the ammunition: i.e. an effective sentence of 30 years imprisonment. With the leave of the court *a quo*, granted on 5 September 2006, the appellant appeals against both the convictions and the sentences.

[2] On appeal, the appellant contends that the State failed to prove beyond a reasonable doubt that it was the appellant and Mokoena who shot and killed the deceased. With reference to ***S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA)** at 593e-594h, the appellant has highlighted the contradictions in the evidence of the two state witnesses, Mmbathu Phyllis Kolobe ('Ms Kolobe') and Michael Potswane Mofokeng ('Mofokeng'), and contends that because of the contradictions the appellant's version should have been accepted as reasonably possibly true. The appellant contends that if the convictions are confirmed the sentences should be ordered to run concurrently. He submits that the three counts arose out of the same incident and the sentences should have been ordered to be served concurrently to avoid the imposition of a disturbingly inappropriate sentence. The respondent supports the convictions but concedes that the convictions should have been taken as one for the purposes of sentence and submits that a sentence of 15 years imprisonment is appropriate.

[3] It is common cause that at about 15h00 on Sunday 2 March 1997 and at the shebeen operated by the second state witness, Michael Mofokeng, two men shot and killed Leonard Tshepo Marvel Khabi

('the deceased') and that he died on the scene from a bullet wound in the heart. It is also common cause that at the time of the murder, the deceased's girlfriend, Ms Kolobe, who was also the first state witness, was sitting at a table in the shebeen with the deceased. It is further common cause that the appellant and Mokoena were present in the shebeen, in the same room as the deceased and Kolobe, when the murder was committed.

[4] The issue before the court *a quo* and this court was whether the State proved beyond a reasonable doubt that the appellant and Mokoena entered the shebeen, took out firearms and shot the deceased as he was standing up. The appellant and Mokoena denied that they shot the deceased. They testified that two other unknown men entered the dining room through an outside door, produced firearms and shot the deceased while he was in the process of standing up.

[5] It is of importance in this case that the appellant and Mokoena have nicknames: the appellant is called 'Khalo' and Mokoena is called 'Slender'. It is common cause that after the murder the appellant and Mokoena left the premises without leaving their names and addresses or telephone numbers and that they did not communicate with the police or attempt to assist the police in any way. It is also common cause that between 15h00 and 19h00 on 2 March 1997 Ms Kolobe gave a statement to the police in which she identified the killers as Khalo and Slender. After describing how she had met Slender in the

street outside the shebeen before the murder she described the murder as follows:

> 'At about 15h25 Slender came back accompanied by Khalo also the suspect and found me sitting next to Tshepo (deceased). Tshepo was busy drinking beers. Slender just said to the deceased to shoot him as he had promised to shoot him. Tshepo didn't replied and he just stood up. Slender and Khalo drew up pistols and shoot Tshepo the deceased but I didn't notice where he was shot. Tshepo fall down and lyed on his stomach and bleed furiously.
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> Boty suspects went out freely without running and Seputswe, the owner of the house went out to phone the police officers.'

This statement put her right next to the deceased when Khalo and Slender spoke to the deceased and fired shots at him. It was not disputed that the people referred to were the appellant and Mokoena and it was not suggested, let alone proved, that Ms Kolobe had a motive to falsely implicate the appellant and Mokoena in the murder. It was not suggested to Ms Kolobe that before the police took her statement she conspired with someone to falsely implicate the appellant and Mokoena. Ms Kolobe was not a friend of either the appellant or Mokoena and the only way she could have identified them by their nicknames was if she had met them previously, as she testified.

[6] The second state witness, Michael Mofokeng, also gave the police a statement at about 19h00 on 2 March 1997. Unlike Ms Kolobe, Mofokeng did not identify the killers. He spoke about three unknown black men who came into the shebeen, one of whom produced a pistol and shot the deceased. In his evidence however, Mofokeng testified that the appellant, Mokoena and one Neo, who was not called as a witness, entered the shebeen, where the appellant and Mokoena shot and killed the deceased. As can be expected Mofokeng was extensively cross-examined on the discrepancies between his statement and his evidence and between his evidence and that of Ms Kolobe. Mofokeng did not concede that he wrongly identified the appellant and Mokoena and he insisted that he was present when the murder was committed. It also emerged that Mofokeng later made another statement in which he rectified the errors in the first statement. In this statement Mofokeng clearly identified Khalo and Slender as the killers. Mofokeng was not cross-examined on his second statement.

[7] The approach of the counsel defending the appellant and Mokoena was to emphasise the discrepancies between the witnesses' evidence and their statements and between the witnesses' evidence *inter se*. They did not succeed in obtaining any concessions regarding the identity of the murderers.

[8] The appellant and Mokoena were not impressive witnesses. They could not explain why they simply left the murder scene and did not attempt to assist the police to find the perpetrators. They also could not explain why they did not immediately raise with the police their innocent version. They also could not explain how Ms Kolobe could identify them if she did not know them. It is also inherently improbable that the shebeen was as full as they say at the time of the murder. The relevant photographs do not show pieces of glass on the floor or bottles on the table. Their evidence also differs to such an extent from the version put to the state witnesses that it cannot be accepted as the truth and the evidence of the state witnesses must be accepted as correct – see ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** **2000 (1) SA 1 (CC)** paras 61-63; ***S v Boesak*** **2000 (1) SACR 633 (SCA)** para 50-54. Thus, they testified that they each arrived separately at the shebeen, that they purchased beer from Mofokeng, that they sat for some time drinking their beer (the appellant consumed two drinks and Mofokeng said 35 minutes) before the murder, that the murderers entered the dining room through the outside door and that only one shot the deceased. None of these matters was put to the state witnesses and they contradicted the version put that both men had shot and killed the deceased. Their explanation for why

they did not describe to the police the murderers and how they were dressed defies belief.

[9] The court *a quo* carefully considered the evidence and the probabilities and concluded that the appellant and Mokoena murdered the deceased. While it is true that there were contradictions in the state's evidence these contradictions do not relate to the identification of the appellant and Mokoena as the perpetrators. They certainly do not justify a finding that the court *a quo* erroneously convicted the appellant and Mokoena – see ***S v Mafaladiso en Andere supra*** at 593i-594c. Ms Kolobe was an outstanding witness. Her evidence was clear and coherent. She did not contradict herself in evidence and she satisfactorily explained the errors in her statement. Significantly the defence did not even attempt to place her second statement before the court. She was present at the murder and saw people whom she knew shoot and kill the deceased. She told the police who they were within hours of the incident. There is no suggestion that she wished to falsely implicate the appellant and Mokoena in the crime. If Ms Kolobe had been a single witness a conviction would have been justified on her evidence. In the light of all the facts Mofokeng's evidence corroborates that of Ms Kolobe. He satisfactorily explained why he did not identify the killers in his first statement made on 2 March 2007 and the defence did not cross-examine him on the second statement in which he identified the appellant and Mokoena as the perpetrators. I agree with the reasoning and analysis of the facts of the court *a quo* and also

consider the contradictions to be immaterial. In my view the conclusion of the court *a quo* was correct and there is no basis for overturning the convictions.

[10] Regarding sentence, the concession made by the respondent is too generous. This was a carefully planned execution of the deceased. There can be no doubt that the appellant and Mokoena went to the shebeen to murder the deceased. The sentence of 25 years imprisonment was therefore appropriate. In my view the other sentences were also appropriate. There is no basis on which this court can interfere with them. Nevertheless I agree with the appellant's counsel that the cumulative effect of the sentences is excessive and that the sentences for unlawful possession of the firearms and ammunition should be ordered to be served concurrently with the sentence for murder.

Order

[11] I The appellant's appeal against the convictions is dismissed;

II The appeal against the sentence is upheld insofar as it is ordered that the sentences imposed for the unlawful possession of the firearm and ammunition be served concurrently with the sentence imposed for murder. The effective sentence is therefore 25 years imprisonment.

III In terms of section 282 of Act 51 of 1977 it is ordered that all the sentences imposed be deemed to have been imposed on 10 June 1998 so that the appellant serves an effective sentence of 25 years imprisonment from 10 June 1998.

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**B.R. SOUTHWOOD**
**JUDGE OF THE HIGH COURT**

I agree

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**M.F. LEGODI**
**JUDGE OF THE HIGH COURT**

I agree

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**J.R.G. POLSON**
**ACTING JUDGE OF THE HIGH COURT**

CASE NO: A306/07

HEARD ON: 4 February 2009

FOR THE APPELLANT: MR. J. VAN ROOYEN

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. P. VORSTER

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 6 February 2009