

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: SS147/09

DATE: 2010-11-18

In the matter between

THE STATE

and

INNOCENT MQALANGA

BONGANI MQALANGA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

24/4/2013

DATE

SIGNATURE

Accused 1

Accused 2

J U D G M E N T

VICTOR J:

[1] The accused in this matter are two brothers, accused 1 is 31 years of age and accused 2 is 24 years of age.

[2] They are charged with the murder of Charles Thora, in that on 12 September 2009, and at or near Holomisa Section, Bekkersdal, Westonaria, they unlawfully and intentionally killed him, and at the same time robbed him of his bicycle.

[3] At the commencement of the trial admissions were made in terms of EXHIBIT A. They were read into the record. The cause of death as determined by Dr Gina Marie Rowe was multiple penetrating incised wounds, and paragraph 4 of the *post mortem* report reflected some eight wounds. These wounds ranged from the right shoulder, the middle third of the right clavicle towards the intercostal space of the midline, the sternum to the right nipple, and another section of the second intercostal space 11 centimetre to the left of the midline, and another puncture wound to the left of the sixth intercostal space, and there was massive blood in the abdominal cavity.

[4] The photographs handed in of the scene showed the deceased lying on a gravel road close to some shacks surrounded by massive amounts of blood. On the scene in photograph 12, was what looked like a spear and there was also the handle of a knife.

[4] The first witness to testify was Ms Nonopha Peter. She

testified that at approximately midnight she together with the two accused persons left John's Tavern. They were going home to sleep. She was the girlfriend of accused 1, and she testified that the girlfriend of accused 2 was already at the room asleep when they arrived there.

[5] On the way the incident occurred. They came across a man on a bicycle. Accused 1 kicked the front wheel of the bicycle. Accused 2 took the bicycle and placed it at the corner. Accused 1 remained strangling the man on the bicycle who had fallen off. Accused 2 came back to the scene and placed the bicycle at the corner. The deceased himself stabbed accused 1 on his neck whereupon accused 2 said: "Let us kill this dog". Accused 1 kneeled on the deceased's tummy and accused 2 stabbed the deceased. They then left the deceased where he was, took the bicycle and went to their home.

[6] She testified that on the Sunday accused 1, accused 2 and accused 2's girlfriend Wendy came to her place and they told her to get hold of money and that they should flee from that place. Her sister advised that under no circumstances should she do that. Ms Peter was recalled on this point because of a glitch in the interpretation of that portion of her evidence.

[7] In cross-examination Ms Peter did not deviate from her testimony.

It was put to her that she wanted to falsely implicate accused 1 and 2 because of an incident that occurred between accused 2 and her boyfriend, Casper. It appeared quite clearly that accused 2 had asked forgiveness and there as nothing in Ms Peter's demeanour when she answered her questions pertaining to the situation that there was any indication of malice on her part. She answered her questions frankly and credibly. Even when it came to how much liquor she had consumed that night she was quite frank and candid and she said that between the five of them they had consumed six quarts of beer from 20:00 when she sat there with her women friends.

[8] She testified that she was not intoxicated. She knew quite clearly what she was doing and it was quite apparent from the manner in which she testified that her story remained consistent and coherent throughout.

[9] The version of accused 1 and 2 was put to her, namely that she and the accused were never at the same tavern that night. They were at another tavern the Seswazi Tavern and went home at 20:30 that night. She was cross-examined on her statement and there was no contradiction between her testimony and the statement. In paragraph 7 of her statement she described quite graphically the following:

"I then noticed Bongani, (accused 2), holding an Okapi knife and

stabbing this man on several times. This man was screaming and after a while he stopped screaming."

[10] A perusal of the *post mortem* report is consistent with this evidence in that there were at least eight puncture wounds to the deceased.

[11] The Community Police Forum, "CPF", became involved in the investigation. Mr Kaya Nxela testified. He was the chairperson of the Neighbourhood Watch. At about 07:00 on the Saturday, 12 September 2009, he received a report about a murder and the report indicated that Ms Peter knew about the incident, and one Wendy. He, together with other member of the CPF made enquiries. Wendy gave him the address of Ms Peter, who was also referred to during the trial as Mababeze. After receiving the report from Ms Peter he then proceeded to find out exactly what had happened.

[12] His statement was admitted into evidence. Right at the end of the trial it was suggested that Mr Nxela was biased against accused 1 and 2 because Wendy was his niece and there were some problem in that regard. However, that was never put to Mr Nxele in cross-examination.

[13] Just for clarity of record, Mr Nxele was also referred to as Mr Mia.

Mr Nxele then found accused 1 at the grounds on the Sunday morning at around about 09:00 to 09:30. Accused 1 was taken to the CPF base and eventually the bicycle of the deceased was found at the sister of accused 1 and 2. Mr Nxele testified that he requested the sister of accused 1 and 2 whether he could search her place, she agreed the bicycle was found next to a bed.

[14] To rebut this evidence the accused called their sister and she testified that she was drunk on the day in question, but was adamant that the bicycle was not found at her place. Upon further investigation it was clear that she was sitting next door with friends, her husband was in the house and she was adamant that the bicycle was never found at her place. She was unable to explain how she could have known what was found in her house if she was not present. The accused never called her husband to testify further on that aspect of the bicycle.

[15] Ms Thora, the widow of the deceased, identified the bicycle when Mr Nxele took it to her home. In fact, as he approached the home of the deceased, the deceased's young son burst out crying when he recognised his father's bicycle.

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THE STATEMENTS

[16] Accused 1 was then handed to the police. When accused 1 was taken into custody he apparently made a statement to Mr Godfrey Thobejane. Upon a perusal and examination of the circumstances under which the statement was taken, it was clear that Constable Thobejane had not advised accused 1 of his rights in terms of the Constitution, although it would appear that at some stage Mr Fanie Nxele did advise accused 1 of his rights. However, the contents of the statement to Constable Thobejane is tainted and the admissions made therein are not admissible and do not form part of the conclusions that I come to in this matter.

[17] Constable Oageng was called to testify about the arrest of accused 2. She testified that she received information from an informer that accused 2 was at Fochville and she described how he was arrested. She took a statement from him. She went through the pre-statement procedure very carefully, in that she advised accused 2 of all his rights. She was cross-examined rather vigorously on this aspect, and it was clear that she had indeed, prior to taking the statement, advised accused 2 of all his rights.

[18] She was not a commissioned officer. However, the contents of

the statement she took does put accused 2 on the scene. Accused 1 was requested to make a statement to a magistrate and he refused to do so.

[19] Accused 2 also made a statement to Captain Shivalo. Captain Shivalo also advised the accused of his rights. However, it is clear from the statement that Captain Shivalo did not deal with the pre-statement procedures in any great detail. It was quite clear that where some of the questions were in the alternative, Captain Shivalo did not fill in the appropriate answers. In other words, where for example a question required a "yes" or "no" answer, Captain Shivalo did not delete the appropriate response. A further example of his omission to deal with the statement in some detail is to be found in paragraph 9, the question is in the alternative:

"During the interview the suspect was seemingly of sound mind."

And subsection B, that is the next question, says:

"The suspect was seemingly not of sound mind."

And the appropriate sentence was not deleted.

21. The content of the statement given by accused 2 was *exculpatory* in nature, in any event, insofar as he implicated accused 1, there was no application brought at the appropriate time for the exception to the hearsay rule to be applied. There was a belated application for the content of the admission by accused 2 against accused to be applied.

[20] I did not uphold the application by virtue of the extent of the prejudice at that stage, and therefore I do not attach any weight to the contents of the statement made to Captain Shivalo by accused 2.

[21] When accused 2 testified about the statement, he stated that he was given a series of blank pages and he was simply told to sign. I find that that version is not reasonably, possibly true. Captain Shivalo had nothing to do with the investigation and by virtue of the great detail contained in the statement I find it unlikely that Captain Shivalo would have made up the minute detail described in the statement. Of importance is the manner in which accused 2 dealt with this statement goes to his credibility.

[22] An analysis of the version of accused 1 and 2 has to be assessed and a finding has to be made whether their version could reasonably, possibly be true. Their version is, as already indicated, that they left the tavern, Seswazi Tavern, not the John's Tavern, at about 21:30 and they went straight home.

[23] They both relied on the testimony of their mother, Ms Mqalanga, to confirm this. Obviously they do not bear the onus to prove the correctness of what really is an alibi, namely that they were not in

the street near the tavern at 03:00 that morning. However, once they called their mother, it soon became evident that she had absolutely no independent recollection as to what time they came back. She did however call out when she heard the chain to accused 2's door being opened, as to who was there, they did not call out to her that it was them and she had no idea what time it was.

[24] Accused 1 had testified quite adamantly that his mother in had also told them that she was having trouble with accused 2's son in that he was restless, however, when she testified, she certainly did not touch on this aspect and was unable to meet or corroborate accused 1's version.

[25] There is mention that she sat and listened to the evidence of accused 2 and when it became evident that she was in court and she was asked to leave. However, the one opportunity that accused 1 and 2 had to confirm aspects of their version, namely, the time that they came home and the bicycle, both their witnesses were unable to even vaguely corroborate their story or to lend any weight as to whether their version could reasonably, possibly be true.

[26] I have already referred to the satisfactory evidence of Ms Peter. There is one aspect, however, which was submitted on behalf of the

defence that there was a glaring error, and on that particular aspect alone her evidence as a single witness is not satisfactory and should not be accepted. Ms Peter testified that they had left John's Tavern at about midnight and that the murder occurred shortly after that on their way home. However, it was quite clear that the deceased was murdered at 03:00. That is the time that Ms Thora said her husband, the deceased, usually left home. He used his bicycle to go to work and he did carry a weapon with him in order to protect him from bad elements in the early hours of the morning.

[27] The question therefore is, whether the perception by, or the testimony of Ms Peter regarding the time is such that the state has failed to prove its case, based purely on that time differential. In weighing this aspect, the evidence of Mr Nxele is also important. He testified that there was a rule imposed on taverns in that area that they were to close at 02:00, and I got the impression that it did not mean that everyone had to leave the tavern at 02:00, but that the sale of liquor stopped at 02:00.

[28] Counsel on behalf of the state submitted that although it was not completely clear from the evidence of Mr Nxele, that patrons do not necessarily have to exit the tavern at that time and they were entitled to finish their drinks.

[29] In assessing this portion of Ms Peter's evidence, being the only bit of evidence which, the state submitted, was unsatisfactory, nonetheless, her evidence has to be assessed against the entire framework of evidence. Her evidence does not have to be satisfactory in each and every respect. There may be aspects which leave untied, loose ends; however, what is of importance is that her evidence be inherently consistent and credible.

[30] I find that the evidence of Ms Peter does have an inherent consistency. The corroboration not only lies in her evidence, but in relation to other features of the entire case. The corroboration lies in the number of stab wounds, being the multiple stab wounds that she testified to and what the *post mortem* report revealed; there is the consistency about the bicycle; and of course by Ms Thora. It would be completely improbable that Ms Peter could have fabricated the entire version as to what happened that night in the coherent and consistent manner that she did testify.

[31]. During the course of the trial the court criticised the fact that Wendy was not called because she could have corroborated Ms Peter in relation to when they returned to the shack of accused 2. At a certain point counsel for the state sought to re-open the case to call the evidence of Wendy because up to that point she had disappeared from the area, and whether it was pursuant to a question raised by the court

as to the level of investigation in this case, or whether it was simply fortuitous that Wendy had been found, counsel nevertheless brought the application.

[32] The re-opening of the case was vehemently opposed by the defence counsel, and I found that the prejudice to the accused would be insurmountable, because they should have known from the outset as to whether or not Wendy would be called. It was for that reason that I disallowed the re-opening of the case to introduce Wendy's evidence.

[33] I did however allow state counsel to have Wendy sit next to him, and this was during the cross-examination of accused 2, bearing in mind that Wendy was apparently the girlfriend of accused 2. However, it was quite clear that whatever was put to accused 2 during cross-examination could only have been hearsay, and therefore whatever emerged out of those instructions does not form part of the evaluation and assessment of the testimony in this case.

[34] I find that the state has discharged its onus in proving the guilt of accused 1 and 2. The time difference in the evidence of Ms Peter is not such as to undermine the state's case. The onus has been discharged by the state. Ms Peter did not claim to have a watch, nor was she

asked as to whether she had a watch that evening, and for the remaining consistent and corroborative aspects of her evidence, I find that she was satisfactory in every respect and that the time differential could well have been a mistake or an oversight.

[35] In the result I found Accused 1 and 2 guilty of counts 1 and 2 as charged.


Victor J