

**IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)**

HELD AT MMABATHO

CASE NO: CA165/2004

In the matter between:-

GEORGE MAUBANE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

LANDMAN J:

The appellant is George Tabane Maubane, accused number 1 in the court a quo. Dennis Chauke was accused number 2 at the trial. The appellant was represented by Advocate Goosen. The accused were charged with the following offences:

- Two counts of murder. The murder of Gerhardus Marthinus Potgieter and Joseph Mothusi Mosimane on 9 March 2001 at the

Lehurutshe Shopping Complex by shooting them with firearms.

- Robbery with aggravating circumstances. The robbery of R142 000, two 9mm Parabellum caliber Norinco semi-automatic pistols and one Ericson T286 the property of North West Security and/or Standard Bank in the lawful possession of the deceased.
- Theft: the theft of a Nissan one tonner van.
- Contravention of section 2 read with section 39 of Act 75 of 1969. Being unlawfully in possession of six firearms.
- Contravention of section 36 read with section 39 of Act 75 of 1969. The unlawful possession of ammunition.

The appellant and his co-accused pleaded not guilty to all the charges preferred against them. His co-accused made a plea statement. A photo album consisting of 12 photos was handed up by consent and the contents of the key to the photo album was admitted as being correct.

The State called Patrick Dingaan Moleti. He is a former co-accused and was warned by the Court a quo in terms of s 204 of the Criminal Procedure Act of 1977. The accused were known to him prior to 9 March 2001. The appellant was introduced to him by a friend of his during December 2000. He got to know accused number 2 during 2001.

On Saturday 24 February 2001 he received a call from one Patrick Nkareng of Lehurutshe who informed him that he was on his way to Wits Technicon.

Patrick Nkareng picked him up from Ga-Rankuwa. Patrick Nkareng made

some requests to him. And so he went in search of the people that Patrick needed. He spoke to the appellant and told him that Patrick needed him to fetch money or to work for money in Lehurutshe. The appellant wanted to speak directly with Patrick.

Mr Moleti, appellant, his co-accused and one Sipho went to Lehurutshe on 2 March 2001. They travelled in Sipho's Volkswagen Kombi. At Lehurutshe they went to a shopping complex where Patrick (he is also called Bigboy) and a friend waited for them. After meeting at Patrick's house, they proceeded to where the robbery was to be committed at the Lehurutshe Shopping Complex. They were to take the money to be fed to the Standard Bank automatic teller machines at the Complex.

Mr Moleti remained behind with one of Patrick's friends. They returned to the house. There a discussion was held as to how the robbery was to be committed. They discussed the position that each would take and decided that they would get a Kombi as a getaway car. They would take the money after the security officers left their van. This information came from the appellant and Sipho. They talked about the firearms that should be used. They agreed to return on Friday 9 March 2001 to execute the robbery. They agreed that they would be on the scene by 09:00 in the morning. They then went back to Pretoria.

On 8 March 2001 they proceed to Zeerust. They arrived there at about 08:00 in the morning. They proceeded to Lehurutshe where they found two men waiting for them at the complex. They slept overnight. On the morning Jackie came to pick them up. They were then dropped off at the complex. He then went to the spot where it was agreed that he would be waiting. He was in the company of the appellant, accused number 2 and Sipho. All four of them were armed with handguns.

After they were dropped off the Volkswagen Kombi was parked at the agreed spot.

Back at the complex everything was going according to plan. Everyone took up their positions. After approximately 30 minutes, a 1400 bakkie arrived and parked next to where Mr Moleti was seated. It was followed by a white bakkie.

Two women, a white lady and a black lady, alighted. A white man and a black man alighted from the other bakkie. They were both security officers. One carried a bag. Both were armed.

He says that he then moved from the position where he was seated and followed them. He took out his firearm. Accused number 2 cocked the firearm that he had and approached the security officers. One security officer tried to grab accused number 2 by using both his arms. A shot was fired. Accused number 2 kept firing shots at the security officer until he fell down. The white security officer ran towards the pavement. Accused number 2 shouted to Mr Moleti that he should watch out and that he should shoot the white security

officer. Accused number 2 then pointed his firearm in the direction of the white security officer and fired a shot. The officer was struck and fell down with his forehead on the ground. The black security officer was lying in a pool of blood.

Mr Moleti said that he did not fire any shots. According to the plan they were not supposed to shoot. After accused number 2 started firing shots, he took cover behind a pillar. The women were lying on the ground. Sipho and appellant came running and he could hear shots being fired. Sipho then grabbed the bag containing the money. At that point in time accused number 2 was still pointing the firearm.

The appellant went to fetch the firearm of the white security officer. He also picked up some other items, including keys. Accused number 2 took the firearm belonging to the black security officer.

The appellant approached the 1400 bakkie. The keys did not fit the 1400 bakkie. He then went to the white van. He opened the van and the rear door. Mr Moleti and Sipho climbed in the rear. The van was started. They drove off to where Jackie was waiting with the getaway vehicle, i.e. the Kombi.

They alighted. He and Sipho went to the getaway vehicle. It was decided that all the occupants except the driver of the getaway vehicle must lie down inside the vehicle. When they drove out of Lehurutshe only the driver was visible. The occupants of the van were Mr Moloti, the appellant, accused number 2,

Jackie and Sipho.

They travelled along the road leading to Zeerust. Before they could enter the town they turned off and went to a township where there are flats. The Kombi was parked outside. Mr Moleti was asked to go into the house to fetch a screwdriver in order to open the panels. When he ultimately returned, however, the panels inside Kombi had already been removed. Jackie said that this was the safest way to hide the money and firearms.

The money as well as the firearms were then hidden in the panels of the Kombi. They then left. While they travelled along the Koster road they threw the empty money bag out of a window. They took a gravel road leading to Koster. Later on they joined a tarred road again. Along the way they stopped at a garage next to the road for fuel. Mr Moleti, accused number 2 and Sipho alighted from the Kombi. The appellant and Jackie remained in the Kombi. Accused number 2 and Sipho entered the shop. Mr Moleti went to a place next door. They also bought some Simba chips. Accused number 2 and Sipho bought white shirts which they immediately put on. He says after that they then proceeded with the Kombi towards Derby. They again stopped at a large garage in Derby. Mr Moleti alighted and he went into the shop. He then saw a white bakkie that made a U-turn and parked behind the Kombi. It seemed that the occupants of the white bakkie were policemen. He was concerned and he asked about the occupants of the white bakkie. Jackie replied by saying the occupants of the white bakkie will lead them out of the town because their vehicle bears a Gauteng registration number in a small town. After they refueled they drove off towards Magaliesburg. The white bakkie following them. There was some misunderstanding between appellant and Jackie because the appellant, on realising that it was the police, suggested that they should take an off-ramp but Jackie refused. He says whilst driving along the way he saw police vehicles parked along the road. They passed the first group of police vehicles. When they reached the second group of police vehicles, their vehicle was stopped.

The occupants were asked to alight the vehicle and they were made to lie face down on the ground. The Kombi was searched and money as well as firearms were found in the Kombi. They were asked who the driver of this Kombi was. Jackie identified himself. After some discussion they were arrested and put into a van.

Mr Moleti was asked whether they gave anybody a lift along the way. He said that he could not remember. Mr Goosen, who appeared on behalf of the appellant at the trial, cross-examined him with regard to his character and it emerged that he is serving a prison sentence for robbery. He was asked whether he trusted the appellant enough to tell him about the planned robbery and replied in the affirmative. On being asked why he approached the appellant Mr Moleti said "it is according to how he knows the appellant since they have met."

When asked by Mr Goosen why he went along and partook in the commission of these crimes he said, "I was part of them and I was part of the job that was planned to do." He agreed that they were not supposed to fire any shots, nor was it intended that these firearms be used to injure or kill anyone. He was asked by Mr Goosen whether he was prepared to use the firearm, whether he was willing to do so and he said, "If necessary, yes." During further cross-examination it emerged that the shots which came from the direction from which the appellant was running was apparently fired in an attempt to scare some of the people present. Mr Moleti said that the appellant drove the van belonging to the security officers from the scene of crime to the getaway vehicle.

Mr Moleti was adamant that no other person, save the five that he mentioned, were in this Kombi. No one was picked up on the way. It was put to him that he was falsely implicating the appellant in the commission of the offence he denied this. It was also put that on the day of the arrest the appellant was hitchhiking and the Kombi picked him up along the Koster / Magaliesburg road. Mr Moleti said that that was not true. It was put to him that the appellant was hardly five minutes on board the Kombi when it was stopped. This was denied. This witness was asked by Mr Goosen whether he knew the address of the appellant in Mamelodi. He said he did not, but he knew the place where the appellant stays. He added that he can go directly to that place. When asked with whom the appellant lives, he replied that it appears that there was clothes of a girlfriend at his place.

This witness was also cross-examined by Mr Phetoe who appears on behalf of accused number 2. He was asked whether he trusted accused number 2 and he said he asked the appellant to recommend somebody else and accused number 2 had been recommended. He said accused number 2 stays in Mabopane. The version of accused number 2 was put to him.

Pieter Lodewyk van Aswegen testified that on 9 March 2001 he was in the South African Police Services. He was on duty. He received a report and on the strength of this report he proceeded to Lehurutshe Shopping Complex where a robbery was allegedly committed. He received some information there and then he informed people in the neighbourhood to be on the lookout for a certain Kombi. This he had done through a close band radio system - the Marnet system. He said he proceeded to Zeerust following up some of the information that was received. He established that the Kombi was on the way

to Koster. According to him he received information that this Kombi had five occupants. He also received further information that the occupants of this Kombi bought certain clothes and liquor. He said he was still following up this information.

He proceeded to Derby where they put in some petrol. He received further information about the registration number of the Kombi. He then phoned the police station and gave that information about the registration number of the Kombi. They proceeded to Magaliesburg. He said approximately six kilometres from Magaliesburg he saw the blue lights of police vehicles. When they arrived there at the scene, the occupants of the Kombi were already outside. He was shown certain weapons and money which was allegedly hidden in the panel of this Volkswagen Kombi. He said upon being satisfied that the people are arrested, he then returned. He said there were five occupants in the Kombi.

He was questioned by Mr Goosen with regard to the number of occupants and he conceded that the number of the occupants was of great importance to him. He was confronted with paragraph 6 of his statement. The number is not mentioned. He stated that it is mentioned earlier on in that same statement.

Inspector Morne Potgieter stationed at Roodepoort Dog Unit told how he found the money and firearms in the Kombi after it had been stopped. He was present when the money was counted. It amounted to R142 530. Under cross-examination by Mr Goosen he testified that he did not ask for an explanation

from any of the accused persons.

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Ms Ancelle van Tonder testified that she was employed by Standard Bank, Zeerust. On 9 March 2001 she was part of the team that went to put in money in the automatic teller machines. She told of the events that took place. After the assailants left she then phoned the bank personnel on her cellphone. She ran to Mrs Molubi and established that Mrs Molubi was okay. She could see that the black security officer had problems breathing but the white security officer had already passed away. Under cross-examination by Mr Goosen she said that she was unable to identify the robbers and she did not know how many were present.

Captain Letlhogonolo Lucky Gause testified that on 9 March 2001 he visited a robbery scene at the Lehurutshe complex. He detailed what he observed.

Louis Prins testified that the two deceased persons were in the employ of the North West Security Company. It was part of their duties to transport money to the bank. He testified as regards the weapons and the Nissan Bakkie.

A ballistic report was handed in. The bullet mentioned in 3.8, that is marked 27981/01 M1 and M2 was fired out the weapon mentioned in 3.6. The cartridges mentioned in 3.7 of the report was fired from the firearm mentioned in 3.6 of the report.

Inspector Immanuel Moikanyane testified that he was the investigating officer. He testified about various matters. It was put to this witness by Mr Goosen that he also testified during a bail proceeding in the Lower Court. The appellant was said to be linked through fingerprints. He said the evidence was lost in Mafikeng. The trial judge asked about the fingerprints. He said they were uplifted from the motor vehicle belonging to the security company which was used by the robbers to flee from the scene to their getaway vehicle. Inspector

Haasbroek and George Hendrik Brander testified about what they found at the scene of the crime.

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The trial judge found that the witnesses Van Aswegen, Potgieter, Van Tonder and Gause, Louis Prins, Immanuel Moikanyane, Haasbroek and Brander, impressed him as honest and reliable witnesses who had nothing to hide.

The appellant testified in his defence. He was travelling in a Kombi when he was arrested. He did not know whether the Kombi was a taxi or not. He however was hiking when he boarded the Kombi near a garage. He was not on board the Kombi for more than five minutes when it was stopped. He said he did not know any of the occupants at that stage. When he boarded the Kombi there were four people inside the Kombi. He was the fifth person. He said Patrick Moleti as well as accused number 2, were among the occupants of the Kombi. He resides in Mamelodi in Pretoria. But he was “putting up” with his girlfriend at Lover's Rock which is a holiday resort situated next to Magaliesburg. He said that he spoke to the police after his arrest at the scene and he explained to them why he was in the Kombi. He said that he did not see any money or firearms in the Kombi, nor was he informed that there were money and firearms inside the Kombi. He said that he was hiking because he was told that there were no taxis. The arrangement when he boarded the taxi was that he would be dropped off at Magaliesburg.

He was not involved in the planning of the robbery, did he execute the robbery. He disputed the fact that the first State witness knows where he

stays. He stays in his uncle's house in Mamelodi.

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This witness was cross-examination by Mr Maema, who appeared on behalf of the State. He was asked where the exact location of this hiking spot is. He had difficulty in explaining the location of the hiking spot. He conceded that he did not know exactly where it is. He did not know whether it was in Koster or Magalies or near Derby.

He was asked about the location of Lover's Rock and how he came to be at Lover's Rock. He was asked about his girlfriend Lucy. She is a social worker. She is employed in Rustenburg. She traveled to Koster, to work there. Later on he said that his girlfriend was going in the direction of Koster. He did not know whether she was actually going to work in Koster.

He was asked why would he then alight at Magaliesburg when he was on his way to Johannesburg. He then testified that he would have boarded a taxi to Johannesburg from Magaliesburg. The appellant was asked whether he was on good terms with Mr Moleti. He said he was.

Accused number 2 also testified under oath. He resides at Winterveldt. He was in Mafikeng. He arrived at Zeerust to catch a taxi. He got into the Kombi. He intended going to Pretoria. The Kombi turned around and headed in a different direction. He asked why the Kombi did not proceed to Pretoria or Johannesburg. He was informed that it was taking a shortcut. A woman and a

boy boarded the Kombi. The Kombi stopped to put in petrol. He then entered the shop and bought some drinks. The lady and the boy also entered the shop. They boarded the Kombi, drove off and travelled for a long distance. Along the way, at a four-way stop, the lady and the boy alighted. Further along the way Mr Moleti boarded the Kombi. At a certain place they then pulled off and put in petrol. While they were still traveling their Kombi was stopped by police vans. They were asked to get out of the Kombi. He was made to lie face down with the other occupants of the Kombi. He did not see any firearms or money, he was not even made aware of the fact that firearms and money were hidden inside the Kombi.

During cross-examination, by Mr Goosen, he said the appellant was not even seven or 10 minutes in the Kombi before it was stopped. Asked where the Kombi was heading, he replied by saying to Pretoria, but then he added that the person who was seated at the back of this Kombi remarked by saying that he does not have a hope that they will reach Pretoria.

Mr Moekeletsi, who appeared on behalf of the appellant before us, correctly stated that the state relied on the evidence of a single witness Mr Moleti as regards the actual planning and execution of these offences. He pointed out, correctly, that this witness is also an accomplice and that it is trite law that evidence of a single witness should be approached with caution. It was incumbent on the trial judge to approach his evidence with caution and warn himself against the dangers of accepting the evidence of a single witness who

is also an accomplice. There can be no quarrel with this.

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Mr Moekeletsi went on to submit that the trial judge “should have applied more caution than he has done in approaching evidence of Moleti”. During the course of his oral presentation, Mr Moekeletsi retreated from this nuanced submission and submitted that the trial judge merely paid lip service to the cautionary rule.

The trial judge, in his judgment, set out the reason for the cautionary rule, and demonstrates, in the course of this judgment, his application of the rule. The rule does not detail the degree of caution that a trial judge is required to exercise. The rule requires the judge to be aware of the dangers of accepting the evidence of a single witness and the dangers inherent in the testimony of an accomplice. The rule requires the trier of fact to exercise common sense.

The degree of caution will be dictated by the circumstances of the case. In the present case, where the witness is a single witness and an accomplice, the trial judge would be obliged to be particularly vigilant. A reading of the judgment, against the evidence set out in the record, shows that the trial judge was particularly concerned about relying on the evidence of Mr Moleti. The trial judge said:

“But he is not only an accomplice, he is also a single witness to the identification of the perpetrators who committed the

offences alleged and for those reasons *this Court should treat his evidence with the utmost caution.*” (My emphasis.)

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Mr Moekeletsi submitted that Mr Moleti did not know appellant before the event. He could not even tell the court where appellant lived. Mr Moekeletsi pointed out that the Prosecutor suggested the word Mamelodi to Mr Moleti, or that Mr Moleti learnt of the appellant's home while he was in custody or during remand of the matter. It is correct that the prosecutor put a leading question to Mr Moleti concerning the appellant's alleged place of residence. This does not, given the extent of Mr Moleti's evidence, dent his credibility. It is noteworthy that the appellant did not tell the court *a quo* where in Johannesburg he resided or with whom.

Mr Moekeletsi also challenged Mr Moleti's evidence on the following grounds:

- (a) There is no evidence corroborating Mr Moleti's evidence on the planning of the robbery;**
- (b) Mr Moleti's evidence is not satisfactory in that it lacks certainty. When asked whether they gave anybody lift from Lehurutshe that day he does not deny this fact but conveniently says he does not remember. This indicates that Mr Moleti knows that appellant asked for a lift on the way:**

a) It is also surprising Mr Moleti decides to involve the appellant in such a serious operation when he claims to have known him only for two ⁶ months. There is no evidence which says that Mr Moleti got to be very close to appellant in the two months for him to trust appellant so much;

b) Mr Moleti says appellant decided on the day of robbery, yet we know that appellant was not the planner or pioneer of this robbery. He does not even stay in Lehurutshe to assess the best day to execute the robbery. This is indicative of the fact that Mr Moleti is hiding someone who participated in the crimes and is putting blame on the appellant because he was in the Kombi when police stopped it.

As factual statements these submissions are correct but they are not decisive. They must be weighed in the context of all the facts adduced at the trial. Moreover the trial judge, in coming to his conclusion, accepted the credibility of Mr Moleti. Neither this court nor Mr Moekeletsi are in as good a position as the trial judge to make a credibility finding. There is nothing on the record to show that the trial judge erred in finding Mr Moleti to be a credible witness.

Mr Moekeletsi also pointed out that, at the time of arrest, police found nothing on the appellant which links him with the robbery. No identification parade was held. On the other side of the coin the prime residue test which was done on the appellant did not indicate that he had handled a firearm. This, it is submitted, is consistent with the fact that he was not at the scene.

The trial judge was mindful that the appellant was not linked to the crimes other than by the evidence of an accomplice. The court examined the version of Mr Moleti carefully and noted that his version was consistent with the evidence of other witnesses and the findings of the post mortem examination. This, although not implicating the appellant, satisfied the trial judge of the veracity of the essential details of Mr Moleti's evidence. He also correctly took into account the fact that the appellant's version was so implausible that it was false.

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Finally Mr Moekeletsi argued, somewhat tentatively, that according to Mr Moleti, accused No.2 was the one who shot the security officers contrary to the plan. This, he submitted, means that the shooting of the officers was an independent decision by accused No.2 who was not acting in furtherance of Mr Moleti and his accomplices' plan. The appellant can therefore not be held guilty for the two murder counts if this court finds that he was present at the scene.

The appellant and his friends decided to embark on a robbery of money which they knew would be guarded by two armed security officers. They each carried a loaded firearm. It was, at least, foreseeable that they would use their firearms in the course of the planned robbery against the armed guards. There is no merit in this point. The appellant was correctly convicted on both murder counts.

In the premises the appeal cannot succeed and must be and is dismissed.

A A LANDMAN

JUDGE OF THE HIGH COURT

I concur

SAMKELO GURA

I concur

R D MOKGOATLHENG

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING: 14 DECEMBER 2004

DATE OF JUDGMENT: 03 FEBRUARY 2005

COUNSEL FOR APPELLANT: MR MOOKELETSI

COUNSEL FOR RESPONDENT: ADV MAEMA

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