

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

CC 06/06

In the matter between:

THE STATE

AND

**ISHMAEL SONO
EMANUEL MAZIMBI CHAUKE
SAMMY SELEMELA**

CRIMINAL MATTER

MAFIKENG

DATE OF HEARING	:	04 May 2006
DATE OF JUDGMENT	:	02 August 2006
COUNSEL FOR THE STATE	:	Mr I. Balepile
COUNSEL FOR ACCUSED 1	:	Mrs J. Henzen
COUNSEL FOR ACCUSED 2	:	Mrs R. Naude
COUNSEL FOR ACCUSED 3	:	Mr P.A. Pienaar

JUDGMENT

GURA J:

[1] The three accused appear before this Court represented by

Mrs Henzen J, Messrs Naude R and Pienaar PA respectively. The State is represented by Mr Balepile.

- [2] They are facing a charge of murder, it being alleged that on or about 29 August 2004 and at or near Winterveldt in the district of Odi, the said accused did unlawfully and intentionally kill Joseph Tele by hitting him with stones, bricks and sticks and by putting him in a pit.
- [3] All accused pleaded not guilty. Accused 1's defence is an alibi. Accused 2 did not disclose the basis of his defence. Accused 3 denies any involvement in this murder.
- [4] The following formal admissions were made and recorded as admissions in terms of Section 220 of the Criminal Procedure Act.
 - (a) The deceased is the person mentioned in the indictment, that **Mr Joseph Tele**.
 - (b) The deceased died on 29th day of August 2004 at Winterveldt in the district of Odi.
 - (c) The deceased sustained no further injuries from the date on which he was injured and drowned i.e. 29/08/04 until a post-mortem examination was conducted on his body on the 31/08/04.
 - (d) Dr Tshepiso T.L. Kekana conducted a post-mortem examination on the body of the deceased on 31/08/04 and recorded his findings on **Exhibits B**.

- (e) The findings of Dr Kekana as recorded in **Exhibit B** are true and correct.
- (f) The cause of death according to Dr Kekana (DR-T345/04) is correctly recorded as **MULTIPLE INJURIES**
- (g) Captain Johan Hendrik Pretorius took photos of the crime scene and compiled a photo album which is admitted as **Exhibit C**.
 - The photo album is comprised of an affidavit, key, plan and photo.
- (h) Inspector Makhene of Loate Service Centre conducted an Identification Parade and recorded the results in form SAP 329.
- i) The Identification Parade form (SAP 329) is admitted as **Exhibit D**.

[5] The first witness, Mr Ali Skhosana, is a resident of Winterveldt. On 29/08/04 at about 04h00 he took his lover from his place to her residence. He met the three accused in the street who were busy hitting a person. Accused 3 (Sammy) told him that the victim was refusing with his firearm. They trampled on him, hit him with bricks and an iron rod. The victim was lying down.

This couple left the four men there. On his way back, after he had taken his lover to her place, Ali used a different road.

He then saw this trio undressing the deceased of his clothes, they dragged him and threw him into a well. Then they started singing “Ho lukile, Ho lukile” He knew accused 1 by sight for about a year prior to this incident. Accused 3 is Ali’s friend. They drink together. Accused 2 is always in the company of Accused 1 and 3.

- [6] Under cross-examination, he testified that when he talked to accused 3, he was about ten paces away. It was not very dark as it was starting to clear up. Accused 1 and 2 wore lumba jackets that night. When Ali saw the accused on the second occasion they had already thrown the deceased into the well and they had already closed it with a stone. The previous day Ali and Accused 3 drank liquor from 08h00 to 14h00. Between 14h00 and 20h00 they were not drinking. From 20h00 to 21h00 Ali started drinking again. Early that afternoon Ali left Accused 3 at that tavern. Ali finally left the tavern with his lover, Joyce, between 22h00 and 23h00. At the scene of crime Accused 3 was against the idea of throwing the deceased in the well. At the second scene, Ali was about 20 paces from these accused when he saw them again. In his statement to the police he mentioned the names of accused 1 and 3. At that stage he did not know the name of accused 2. He was told his name later. Accused 3 had a red golf T-shirt on, with tight sleeves. They wanted to set the victim alight but the problem was the matches. (Later) It is accused 3 who refused when they wanted to burn him.

- [7] Ms Dorah Mthombeni was the second witness. She resides at Stand No. 1625 Ramotsoma – Winterveldt. Accused 1 is her front opposite neighbour for the past eight years. Their houses are on the same stand. Accused 3 also stays at the same stand. She knows accused 2 by sight as he frequents that stand. At around 03h00 on the day of this incident, as she was asleep, she heard a person calling “Sonto”. Sonto is her sister’s child. She peeped through the window which was still closed. She then advised her sister to warn Sonto not to get used to asking money (like 50c) from Ishmael (Accused 1) and his companions.
- [8] She went back to bed. There was a thud, as if something was thrown. Her granny was sleeping in another house, on the same site, and she suspected that thugs have attacked her. She went out. She identified accused 1,2,3 and a fourth person outside. There was yet a fifth person who was being assaulted by the three accused. They hit him with bricks, boulders, a stick or a kerie. The fourth man did not assault the victim. Accused 1 went to fetch paraffin. Then one of them said: “Ishmael, let’s not burn him”. The fourth person went to sleep. The accused took the victim. His screams gave the impression that he was very tired, they must have come from far with him.
- [9] In the morning there were dirty and bloody clothes next to her home. When the deceased was taken out of a pit, he was clad in an underpant only. On the night in question, there was an Apollo light near Dorah’s place. Accused 2 had a hooded drymack top on. She confirmed that a month after

this event, she identified accused 2 at an identity parade.

[10] The following emerged in cross examination:-

She denied that in 1997 she was in love with accused 1 for three months. According to her accused 1 was in love with her aunt's daughter. She further denied that accused 1 ever assaulted her for a cap which she allegedly took. The fourth person who was present during the assault is alleged to be Simon. Dorah established this only on 7/2/2006 (ie. the very same day on which she gave her evidence in chief). She denied that she told the police that four men assaulted the deceased. The Apollo light was at a distance beyond 20 metres. These people were about 5 paces away from Dorah's house window. As she was under a tree watching them, she was about 7 paces away from them.

[11] The deceased was in love with Dorah's sister. They had two children together but one passed away. When they left that place the time was past 04h00. They talked about a firearm, one of them said "Hey Joe, I want my firearm". The alleged well (pit) is at the second stand from her place. The fourth person actually pleaded for the victim – that he should not be assaulted. About 3-4 days after this incident she met accused 2 and asked him why they did that. He said "It is not me but Ishmael (hulle). During the assault Dorah did not recognise the victim as her sister's lover.

[12] Inspector Van Heerden testified that he proceeded to the alleged water well or pit on the day of this incident. He was lowered into the well. At its bottom, in the water, he found the body of the deceased, clad in an underpant only. There

were whip (lash) marks on his back. The well was deep and the inspector had to be lowered with a rope. The circumference of the well opening was the size of an ordinary rubbish bin.

- [13] Constable Matsane told the court that on 31/8/2004 he saw a group of people at Winterveldt as he was on patrol. There was a person whom this group had arrested. This person was accused 1. Dorah then told Inspector Matsane that “this suspect is one of the people who killed a person yesterday”. Accused 1 denied any participation in the killing. He took him to the police station.
- [14] Mr Phillemon Sibanda testified that he stays at Stand 1625 Ramotsoma. He is a friend to Accused 1. Accused 3 is his neighbour and his mother (No. 3's) is in love with Mr Sibanda's friend. Accused 2 usually visits accused 1. He knows all the accused very well. On 28/8/04 between 22h00 and 23h00, he went to Hlongwane's place where he found Accused 1 and 3. Later they left for Jeje's tavern – at that stage they were with Zaki, his neighbour. Accused 1, 3 and Zaki were very noisy as they were drunk. As they were at Jeje's tavern , they told him that they had been to accused1's lover place, and that after knocking there, accused 1 kicked the door and that thereafter Zaki and Accused 3 threw stones at accused 1's lover place. After telling him this, they left for Gila's tavern. At a 4-Way stop he told them that he wanted to go to sleep. They parted. But then he went to Gila's place; from there he went home.
- [15] On the way to his place, he heard people making noise. He

recognised those voices as that of Accused 1, Accused 3 and Zaki. When he reached the place where the noise came

from, he found a lady who had a towel wrapped around her body and a man on short pants. They stood at the door of a house and this trio was talking to this couple. He asked them why they made noise there whereupon Zaki told him that he came there to collect his money for an identity book. He told them "let's go away". Accused 1 told him to leave them alone. He went away. The time was about 01h00 or towards 02h00 – a Sunday. Between 04h00 and 05h00, his brother-in-law arrived at his house and brought him 3-4 beer bottles. Then he decided to go to this trio to drink with them. He took the beers and proceeded to No.1's place. He found accused 1 but he cannot say with whom he was. Accused 1 then told him that he, Accused 3 and Zaki had killed a person. He (No.1) told him that the victim once robbed him and that they threw him into a pit which has water therein. Later both of them went to Mr Sibanda's place, then to New Lock. He took accused 1 to his place, and at No.1's gate, a lady who passed there told them that a person had just been taken out of the well. Later that day, accused 3 told Mr Sibanda that accused 1 had told them that the deceased was indebted to him. Accused 3 further said that maybe the deceased was already dead when they kicked and beat him. Mr Sibanda saw a stick which was bloodstained at accused 1's place. The witness knows Dorah Mthombeni because they stay on the same stand. Dorah knows him very well also. He never saw accused 2 on 28 or 29/8/04. When the deceased was assaulted; Mr Sibanda was not there.

- [17] Under cross-examination, he testified as follows:- When he first went to accused 1's place it was between 05h00 and 07h00. When he went there for the second time it was about

12h00-13h00. When Accused 1 told him that they had killed a person the previous day, they had just gone out of

Accused 1's gate. On his first visit there, he was shown a blood stained stick by Accused 1, it was lying next to the road, outside Accused 1's place but close to his gate. On the date of this incident, i.e. 29/08/04, Mr Sibanda was under the influence of liquor. However he consumed less than 6 beer quarts. There are about 30-40 families staying at stand 1625 Ramotsoma.

- [18] Inspector Emily Monyamane is the investigator of the case. She did not arrest Accused 1 but she charged him. He made a statement which she wrote down. This statement was handed in as Exhibit I. Basically he denied any participation in this crime. He stated further that on Sunday at about 03h30 whilst he was standing at his gate, Jerry came to him and told him that two people were busy assaulting a person.

Inspector Monyamane testified that as a result of this report by Accused 1 she interrogated Jerry who also made a statement denying that he ever told Accused 1 that two people were hitting a person. This statement is Exhibit K.

Jerry Ramotsoma has however since passed away on 12 April 2005. His death certificate is Exhibit J.

- [19] Accused 1 gave the following account in his evidence. He knew the deceased because he had an affair with No.1's neighbour. However, the deceased never robbed him. During the night of 29 August 2004 at around 03h30, as Accused 1 was asleep, Jerry came to his place. Jerry told him that there were people somewhere who were busy hitting another person. Accused 1 suggested to him that they should follow them but Jerry was against that, saying those people had firearms. Jerry then jumped the fence into his premises and they parted. Around 04h45 Phillemon

Sibanda came with two (2) beers. Since the beers were hot,

they sat there waiting for the tuckshop to open. When it eventually opened, they exchanged those beers with cold ones. Phillemon said his brother in law who is a soldier had arrived and that they would visit December at New Lock. They proceeded to New Lock with Accused 1, Phillemon, his father and others. From there they went to Chantel. Later he was dropped at his place. Later that day Phillemon came to his place again. He found Accused 1 at his gate. A lady called Kadimone passed. She asked No. 1 if he was at the pit when the whites took a person out of it (pit). He replied in the negative.

- [20] On the subsequent Tuesday, Accused 1 received a report from Accused 2 to the effect that the police were looking for him (Accused 1). He proceeded to Loate police station. The police drove with him and the others to Dorah's place. When she was interrogated by the police, Dorah said she did not identify anyone of the assailants. However, she said that she suspected Ishmael.

Accused 1's elder brother is married to Accused 2's elder sister. Accused 3's mother is known to Accused 1 but he does not know Accused 3 and he does not drink with him. Phillemon Sibanda is Accused 1's friend, actually, he calls Accused 1 Malume. Zaki is not Accused 1's friend, infact, he is far younger than Accused 1.

He denied that he ever told Phillemon that they hit a person. He further denied that he ever kicked the door of his lover's place. In the morning of the day of this incident, he saw a bloody lumba jacket on the street. He never saw a bloody stick as alleged by Phillemon.

There is one mistake in his statement to the police (Exhibit I). The statement states that Jerry found Accused 1 at the gate. That is incorrect. The truth is that Accused 1 was asleep and Jerry had to knock at the door.

[21] Cross examination revealed the following. Exhibit L is a case record of the magistrate consisting of ten (10) pages. According to this record on 13 September 2004, Accused 1 and 2 appeared before the magistrate's court. Accused 1 then told the magistrate that Accused 2 was innocent. In cross-examination Accused 1 confirmed the allegation he is alleged to have made. He insisted that despite that he did not see Accused 2 at the time of the alleged assault but he was convinced that he is not one of the deceased's assailants. His reason for saying so is that No. 2 was not in Winterveldt that day. Accused 1 knows Dorah very well, to use his own words, he started to know her when she was still a virgin. He advanced three reasons why Dorah implicated him falsely:-

- i) As former lovers, they are no more in good terms
- ii) He once assaulted her
- iii) She once falsely implicated Accused 1's elder brother

[22] Accused no. 2 testified as follows:- On the day of this incident he knocked off late at work. He spent the night with Sam Biza at Ramotsoma stand at Winterveldt. He does not know the deceased and he never met him on that night. He never met Accused 1 and 3 on the day of this incident. In the morning of the 29 August 2004 Dorah came to Biza's

place and said she was looking for Ishmael who had killed a person. She never implicated Accused 2.

[23] Accused No. 3 also testified. He stays at Stand 1625 Ramotsoma since birth. He is now 20 years old. He does not know Accused 1 and 2. They are not his friends. It is not true, as Ali testified, that during the day on 28 August 2004, he was with his co-accused at the tavern. He knows Ali very well because they buy dagga from him. He denies that he ever assaulted or killed the deceased. He remembers that long before 29/8/04, he snatched dagga from Ali and fled with it. He however, never confronted him in connection with that dagga.

[24] It is trite law that the state bears the onus of establishing the guilt of the accused beyond reasonable doubt, and the converse is that the accused is entitled to be acquitted if there is a reasonable possibility that he might be innocent (**R v Difford 1937 AD 370 at 373**). In the present case, the Court is dealing with the evidence of identification. A rule of practice has evolved in terms whereof such evidence must be cautiously analysed. Not only should the identifying witness be honest, but the reliability of his/her observation must be tested. **See S v Mtetwa 1972 3 SA 766 (A)**.

[25] Ali Skhosana and Accused No. 1 are friends. Therefore, they know each other very well. Ali knew Accused 3 by sight for almost one year as at the time of this incident. However, in his statement to the police, he mentioned the names of Accused No. 1 and 3. On the first stage when he saw the assailants, he was very close to them, he even talked to one of them being Accused No. 3. As regards Accused 2 he does not know him well except that he is most of the time in

the company of Accused 1 and 3. I am satisfied that he (Ali) was able to identify Accused 1 and 3 positively at the first scene. In regard to Accused 2 he may have assumed that it was him. As regards the second scene (when they threw the victim into the pit) Ali found it very difficult to give a convincing narration that he saw this incident. At one stage he said he saw them throw him in the pit, at one stage he said he saw them thereafter. His evidence in regard to the second scene is very lean and unconvincing. In my view, he assumes that it is the three accused who threw the deceased into the pit.

[26] Dorah Mthombeni's sister had a child with the deceased. In fact they had two children but one of them passed away. The Court will have to be particularly extra cautious when approaching her evidence. Naturally, she would want someone to be punished for the deceased's death. She made two statements to the police. Unfortunately these statements are not dated. Why she had to make two statements is a mystery of the wooden stool. A perusal of these statements and her evidence in this court, reveal two material contradictions. They are :-

- i) From where did Dorah watch the assault?
- ii) How many people assaulted the deceased?

[27] Exhibit G and H are statements which she made to the police. In Exhibit G she stated that she watched the assault through a slightly opened window. In Exhibit H she stated that she witnessed the assault through a window. In her evidence in court she testified that she peeped through a

closed window. She then identified Accused 1 and 3. This was before the assault. She then retired to bed again. Later when she heard a thud she walked out of the house, through the door, crept next to a tree where she watched the attack. Her response to this contradiction is that she was still terrified when she made the statements. I find it hard to believe that Dorah would have kept such vital information from the police if indeed she did go out. According to her, she watched the assault very close to the scene. If this is true, she ought to have informed the police. In my view, the real likelihood is that she never went out of the house but watched the assailants through a closed window. It would have been too dangerous on her to go out of the house under the circumstances. Her version before court in this regard, is an attempt to nourish her evidence on the question of identification.

- [28] In Exhibit G she told the police three times in three separate paragraphs that all the four men assaulted the deceased. In Exhibit H she again told the police three times and in three separate paragraphs that all the four men assaulted the deceased and that all four of them took him away. Before Court however, she denies to have given that information to the police. Her evidence is that the fourth man was like a good Samaritan, who never touched the victim but instead pleaded for mercy on his behalf. In my view, it does not need any Solomonic wisdom to detect that on this aspect, Dorah lied to Court. In my view, there is a fourth person who also took part in this assault whom she does not want to see punished.

[29] Despite these findings, I am satisfied that through the closed window, seven paces away from the war zone, with an Apollo light 20 metres away, she was able to identify Accused 1 and Accused 3, her neighbours. In any case, she had already identified Accused 1 at the first stage when someone called Sonto. Accused 1, 3 and Dorah know each other very well, they know each other for many years. The same cannot be said about Accused 2. She knew him by sight. He frequented Ramotsoma stand. On many occasions he was in the company of Accused 1 and 3. It was therefore reasonable for anyone to assume that the third person would have been Accused 2. In my view, this is an honest assumption which Dorah made.

[30] Inspector Van Heerden and Constable Matsane did not incriminate any of the Accused in this case. The court accepts their version of what they testified about.

[31] I accept the evidence of Phillemon Sibanda that on the night of this incident, he met Accused 1, Accused 3 and Zaki who were in a very jovial mood because of the liquor they had consumed. The events of that night between Accused 1, 3, Zaki and Phillemon are not related to the killing of the deceased. I therefore cannot see how Phillemon would lie about them on such neutral matters. He did not witness any assault on the deceased. He knew nothing about the killing until Accused 1 told him. He testified that they are friends with Accused 1. In my view, they are not only friend but bosom friends. Very early in the morning, before sunrise, when he got free liquor from his brother in-law, he walked to Accused 1's house, to share it with him. Again they spent half of that day together. Why would Phillemon make such a

sudden turn and implicate Accused 1 falsely? I am satisfied that Accused 1 did make the alleged admissions to Phillemon, implicating himself in the killing. The state advocate argued that Phillemon misled the court by saying it is Zaki who was with No. 1 and 3. In my view, Phillemon was the most honest and reliable witness in this case.

[32] The evidence of Inspector Monyamane is just formal in nature. She obtained a statement from Accused 1 and from Jerry Ramotsoma.

[33] The next issue is what probative value should this court attach to Mr Jerry Ramotsoma's statement. This indeed is a document which is tendered in terms of Section 3 of the Law of Evidence Amendment Act, 1988. The problem which I have with this statement (Exhibit K) is that it is very brief and to the point. It does not give any background details. The second problem is that it appears more of an exculpatory statement. If Jerry admitted that he made the alleged report to Accused 1, he would most probably have been treated as a suspect. If he denied it then he would not be suspected. Therefore, there was a motive for anyone in these circumstances to deny making the report even if he had made it. Under the circumstances, it is not safe to use this statement to discredit Accused 1.

[34] Accused 1 is not an honest witness. He denies things which are too obvious. There is no doubt in my mind that he was with Zaki and Accused 3 the night before at various taverns. Why does he deny such innocent occasions? In his own words he did not know who the killer of the deceased was. But the first thing he did, when he appeared with Accused 2 in court, was to tell the magistrate that Accused 2 was innocent. It is worthy to note that

he did not say that he, himself, is innocent but he said Accused 2. No person would have made that statement if he did not know who killed the deceased. He insists that Accused 2 was not in Winterveldt that night. Conversely, Accused 2 testified that he spent that night at Ramotsoma stand in Winterveldt.

[35] Accused 2 has been implicated by Mr Ali Skhosana and Ms Dorah Mthombeni. Both these witnesses knew him by sight. Therefore, they did not know him well like they knew Accused 1. The evidence of Mr Phillemon Sibanda is that the third person who was with Accused 1 and 3 that night at least up to 01h00-02h00, was Zaki and not Accused 2. In my view therefore, there is a reasonable possibility that it is Zaki who was at the scene of crime and not Accused 2. Accused 3 is in the same position with Accused 1. They were together for the best part of the night and they were troublesome. He admitted to Phillemon that they beat a person that night.

[36] I have been persuaded beyond reasonable doubt that Accused 1 and 3 are some of the people who killed the deceased. As regards Accused 2 there is doubt whether or not he was present at the scene of the assault.

[37] Consequently, the following order is made:-

Accused No. 1 and 3 are found guilty as charged. Accused 2 is found not guilty.

SAMKELO GURA
JUDGE OF THE HIGH COURT

