

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)

Date: 2008-04-25

NOT REPORTABLE

Case Number: A245/07

In the matter between:

GIDEON SIGASA NELANI

First Appellant

BONGANI OWEN TSHABALALA

Second Appellant

and

THE STATE

Respondent

JUDGMENT

SOUTHWOOD J

- [1] On 5 September 2006 the first appellant, Gideon Sigasa Nelani, and the second appellant, Bongani Owen Tshabalala, were convicted of murder in the Nigel regional court (the first appellant as an accessory after the fact), a contravention of section 3 of Act 60 of 2000 (unlawful possession of a firearm) and a contravention of section 90 of Act 60 of 2000 (unlawful possession of ammunition). In addition the first appellant was convicted of theft (a firearm). The regional court

sentenced the first appellant to three years imprisonment for the theft of the firearm, 8 years imprisonment for the murder (as accessory after the fact), three years imprisonment for the unlawful possession of the firearm and one year imprisonment for the unlawful possession of the ammunition. The regional court sentenced the second appellant to 15 years imprisonment for the murder, three years imprisonment for the unlawful possession of the firearm and one year imprisonment for the unlawful possession of the ammunition. The court ordered that all the second appellant's sentences run concurrently: i.e. the court imposed an effective sentence of 15 years imprisonment.

[2] With the leave of the regional court, the first appellant appeals against his conviction of and sentence for murder and the second appellant appeals against his convictions of murder and unlawful possession of the firearm and ammunition and the sentences imposed therefor.

[3] After pleading not guilty to all the charges, when he testified, the first appellant admitted that he had stolen the firearm, a Browning 9 mm pistol with serial number B 19307 from his uncle, and accordingly that he had been unlawfully in possession of the firearm and ammunition. The first appellant was therefore properly convicted of theft of the firearm and the unlawful possession of the firearm and ammunition in contravention of sections 3 and 90 of Act 60 of 2000.

[4] The dispute in the regional court and on appeal is whether the first appellant or the second appellant fired the shot which killed the deceased, Patrick Mphuti. The first appellant testified that it was the second appellant and the second appellant testified that it was the first appellant. Other witnesses supported the two versions. Eventually the regional magistrate concluded that the second appellant fired the fatal shot and that the first appellant helped to conceal the firearm and hence was guilty as accessory after the fact. This is a factual finding and it is well-settled that in the absence of demonstrable and material misdirection a trial court's findings of fact are presumed to be correct and they will only be disregarded on appeal if the recorded evidence shows them to be clearly wrong – see ***S v Hadebe* 1997 (2) SACR 641 (SCA)** at 645e-f; ***S v Naidoo* 2003 (1) SACR 347 (SCA)** para 26; ***S v Scott-Crossley*** Unreported judgment SCA Case Number 677/06 delivered 28 September 2007 para 10.

[5] The first appellant stole the firearm on 31 August 2005 at a time when there were nine rounds of ammunition in the magazine. The murder was committed at approximately 23h55 on 3 September 2005 near Oupa's Tavern in Duduza. The incident occurred when two groups of people left the tavern. The first group included the deceased, Karabu Bambiza (the deceased's girlfriend), Zakhele, Zindi, Zungu and Bafana.

The second group included the two appellants. When the appellants left the tavern, Zindi was waiting outside. It is not clear precisely what happened but there is no dispute that an argument started between the second appellant and possibly the first appellant and the deceased and that harsh words were exchanged. Zakhele and Zindi left the scene and did not see what happened. The argument continued and others became involved. According to at least one witness mention was made of shooting. Eventually the firearm stolen by the first appellant was produced. Depending on which version is accepted one shot or three shots were fired. It is common cause that a shot fired from the stolen firearm struck the deceased in the face and neck fatally wounding him. The two appellants left the scene. The next day Karabu Bambiza assisted the police by pointing out the first appellant. Before the first appellant was arrested he attempted to run away when he saw the police van approaching. After his arrest the first appellant accompanied the police to a house where he pointed out the stolen firearm. It had been placed inside a yellow plastic bag and concealed in a toilet bowl. Karabu Bambiza made a statement to the police in which she described what happened and who fired the fatal shot. At a later stage she accompanied the second appellant's girlfriend to prison to visit the second appellant and she, Bambiza, and the second appellant had a conversation.

- [6] On appeal the first appellant contends that the regional court erred in finding the first appellant guilty of murder as an accessory after the fact. The first appellant argues that there is no direct evidence to prove that the first appellant hid the firearm to protect the murderer and that is not the only reasonable inference to be drawn from the fact that he hid the firearm. It is equally probable that he hid the firearm simply because he knew that he had stolen it and because he knew it was a crime to possess it.
- [7] The second appellant contends that the regional magistrate erred in accepting the evidence of Karabu Bambiza and rejecting the second appellant's evidence that he was not in possession of the firearm and did not fire the fatal shot.
- [8] Both appellants contend that the sentences are excessive.
- [9] It will be convenient to consider the second appellant's appeal first. If his appeal succeeds the conviction of the first appellant must be reconsidered. Clearly the second appellant cannot be guilty as accessory after the fact – see **S v Gani 1957 (2) SA 212 (A)** at 220A; **S v Jonathan 1987 (1) SA 633 (A)** at 643A.
- [10] The evidence of the state witnesses, Andreas Nelani, Phumzile Nelani,

Zindi Mnisi and Constable Tshepo Phutuma was not challenged by any of the accused and correctly was accepted by the regional court. However, none of these witnesses testified as to who fired the shot which killed the deceased. The quality of the other evidence as to what happened after the two groups left the tavern was poor. The witnesses contradicted each other and in some respects their evidence was improbable and unreliable. The regional magistrate correctly attached no weight to Bafana Seboko's evidence. Seboko attempted to create the impression that he did not know the appellants and had not seen them on the night of 3 September 2005. In this regard he was most unimpressive. The other witnesses placed him on the scene playing an active role in the altercation with the appellants. Notwithstanding the shortcomings in their evidence, the regional magistrate found that Karabu Bambiza and Smangaliso Zungu's evidence was logical and coherent and could be relied upon and that they could be believed. Karabu Bambiza was the only witness to the murder and the regional magistrate found that her evidence was satisfactory in all material respects. The regional magistrate found that the two appellants who each blamed each other were not credible and their evidence should be rejected where it was contradicted by the state's evidence. Accordingly, relying on Bambiza's evidence, he found that the first appellant fired the first two shots (which did not hit anybody) whereafter the second appellant took the firearm from the first appellant and fired

the fatal shot.

[11] According to Karabu Bambiza when she and her friends left the tavern, Zindi sat down and waited. When the appellants left the tavern the second appellant pulled Zindi's hair and the deceased remonstrated with him and this started the argument. Zindi and Zakhele then left and the argument continued until suddenly the second appellant said to a bystander called Bongani, go and fetch the firearm. Scarcely five minutes later Bongani returned with the firearm and the first appellant took it from him. The first appellant then fired a shot between Bambiza and Zungu's legs and Zungu ran away. The first appellant then fired a second shot, this time into the air. The second appellant grabbed the firearm from the first appellant and said to the deceased that they should stop arguing. The second appellant then walked away. After he had taken about three steps he suddenly turned around and fired a shot in the direction of the deceased. The two appellants ran away leaving the deceased lying on the ground, his face bloodied. The police arrived on the scene a few minutes later.

[12] Zungu testified that he was with the deceased, Zakhele, Bafana, Bambiza and Zindi in the tavern. They decided to leave and the appellants followed with the third accused. When they got outside Zindi sat down. The second appellant asked her why she was leaving

without telling him. Bafana then intervened and they started arguing. Bafana said something about shooting each other. Bafana and the first appellant exchanged words. Zungu then grappled with the first appellant and they wrestled until the first appellant freed himself. The first appellant produced a firearm and fired two shots in their direction. Zungu ran away leaving the deceased, Karabu Bambiza and Bafana. He does not know where the third accused was. Five minutes later he heard a third shot. He does not know who fired that shot. Zungu did not know where the first appellant produced the firearm from. He just saw the first appellant had a firearm and that he fired the two shots. He says that Karabu claims that she stayed at the scene but they all ran away.

[13] The first appellant testified that a fight started. He does not know why. But he saw the second appellant take out a firearm and fire one shot at the deceased. He produced the firearm from his midriff and he fired only one shot. He, the first appellant, then took the firearm from the second appellant and they walked off. The second appellant came to sleep at his house.

[14] The second appellant testified that he was at the tavern with the first appellant and the third accused. The first appellant said they must leave. The first appellant went ahead and when they came out of the

tavern they found that the first appellant was having trouble with the other people who testified. The first appellant produced a firearm and fired three shots. He did not see which shots struck the deceased. After the first appellant fired these shots the two appellants walked on and met up with the third accused. They then each went to their respective homes. At no stage was he, the second appellant, in possession of a firearm. The second appellant testified that Karabu visited him in the Nigel prison when his girlfriend came to visit him. Karabu asked him to pay her R2 000 so that she could tell the truth about who fired the shots. He could not or would not pay her. She then said that in that case she would tell the court he fired the shot and she would involve his cousin, the third accused.

[15] The regional magistrate took into account the fact that with the exception of Karabu Bambiza the witnesses had been drinking at the tavern for an extended period and that the incident took place as they left the tavern in the early hours of the morning. In addition it is clear that each appellant had a motive to misrepresent the facts as to who fired the fatal shot. The question is whether there is any credible and reliable evidence to show that either appellant was guilty of murder.

[16] The regional magistrate was impressed by the evidence of Bambiza principally because she testified in accordance with the statement she

made on the night of the incident. The regional magistrate pointed out that she had not been cross-examined on the discrepancies between her evidence and that statement. However he did not refer to the one significant discrepancy or to the contradictions between her evidence and that of Zungu or the improbabilities in her version. All these matters indicate that Bambiza was neither reliable nor credible.

[17] Bambiza testified that the second appellant told Bongani to go and fetch the firearm whereas in her statement she said it was the first appellant who gave the instruction. This change implicates the second appellant immediately and this occurred after the prison visit when, according to the second appellant, she asked him for money so that she would tell the truth and when he refused she said she would involve him and the third accused. It is not in dispute that she did implicate the third accused who was found not guilty on all charges because there was no evidence against him. As argued by the second appellant's counsel the question must be asked why she visited the second appellant and had a conversation with him. There is no satisfactory answer to this question.

[18] Bambiza was contradicted by every other witness on the issue of whether an instruction was given to Bongani to go and fetch the firearm. It is inherently improbable that the second appellant would

have done so. All the evidence shows that the first appellant stole the firearm and was the only person who knew that he had it available. For the same reason it is also inherently improbable that Bongani would know what firearm the second appellant was talking about and where to find it – without asking any questions. It is also inherently improbable that the other witnesses hearing the instruction would remain on the scene. In the circumstances the probabilities point to the first appellant being in possession of the firearm at the scene and producing it in the heat of the argument. It was also striking that Zungu did not believe that Bambiza remained at the scene and that when the police arrived she did not immediately inform them who had shot the deceased.

[19] The regional magistrate had difficulty in explaining why the second appellant's version was not reasonably possibly true. In argument the Director of Public Prosecutions' representative conceded that he could not support the convictions. The second appellant's appeal must therefore succeed.

[20] The remaining question is whether the evidence proved beyond reasonable doubt that the first appellant was guilty of the murder as the perpetrator. The regional magistrate clearly did not think so and found him guilty as an accessory after the fact. The only way in which this

court could find him guilty would be by inference which can only be drawn from facts that have been objectively proved including the fact that the first appellant is a mendacious witness. While I have no doubt that he is I do not think that this court has enough reliable objectively established evidence to safely infer that he fired the shot that killed the deceased. At the very least Bambiza's evidence creates a doubt even if she is not a credible and reliable witness. The first appellant's appeal must therefore succeed.

Order

- [21] I The first appellant's appeal against his conviction of murder is upheld and the conviction and sentence are set aside;
- II The second appellant's appeal against his convictions of murder, a contravention of section 3 of Act 60 of 2000 and a contravention of section 90 of Act 60 of 2000 is upheld and the convictions and sentences are set aside.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

K. MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

CASE NO: A245/07

HEARD ON: 21 April 2008

FOR THE FIRST APPELLANT: ADV. G.S. MARITZ

INSTRUCTED BY: Legal Aid Board

FOR THE SECOND APPELLANT: MR. D.H. MOSTERT

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. L. PIENAAR

INSTRUCTED BY: The Director of Public Prosecutions

DATE OF JUDGMENT: 25 April 2008