IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case Number: A447/08

In the matter between:

VUMA ALFRED	**Appellant**
and	
THE STATE	**Respondent**

JUDGMENT

MOKGOATLHENG, J:

INTRODUCTION

(1) On the 2 February 2009, the court set aside the conviction and sentence imposed on the appellant by the trial court and stated that it will deliver its judgment later. The following are the reasons underpinning the court's order.

(2) Du Toit AJ sitting with an assessor convicted the appellant of murder and in terms of *section 51 (1) of the Criminal Law Amendment Act 105 of 1957* sentenced him to a term of life imprisonment after the trial court

found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence.

(3) The appeal which is with the leave of the trial court, is against the conviction and sentence and is premised on the grounds that the trial court erred in finding that:

(a) there was common purpose between appellant and Makgoba (the erstwhile accused number 1 who died before the commencement of the proceedings in the trial court) to assault the deceased;
(b) the appellant must have been aware of the possibility that Makgoba was armed;
(c) the appellant held down the deceased with the intention to assist Makgoba in firing the fatal shot;
(d) the appellant foresaw the possibility that there was a chance of the deceased being killed but persisted recklessly of such consequences in the common purpose; and
(e) the appellant was guilty of murder on the basis of *dolus eventualis.*

DELAY

(4) A disquieting feature of this matter is that it took 7 years and 7 months for the appeal to be heard. The appellant was convicted on the 22 May 2002 and sentenced on the 15 August 2002. Leave to appeal was granted on the 20 September 2002. The Notice Of Appeal was lodged on the 9 October 2002.

(5) The appellant was not granted bail pending the determination of his appeal. When, during argument the court asked the reason for the delay in setting down the hearing of the appeal, neither Mr Majola on behalf of the State nor Mr Penton from the Johannesburg Justice Centre on behalf of the appellant could proffer any explanation.

(6) From a perusal of Mr Penton's Founding Affidavit in support of the Application For Condonation of the late filing of the appellant's Heads Of Argument, it is apparent that the Notice Of Set Down together with the record of the proceedings were served on the Johannesburg Justice Centre on the 11 December 2008 and the Heads of Argument were to be filed by the 2 December 2008.

(7) It has taken the Director of Public Prosecutions 6 years and 2 months to set down the appeal from the date of the lodgment of the Notice Of Appeal.

(8) The court is aware of the tremendous work load the office of the Director of Public Prosecutions is seized with. The work pressure experienced by that office, does not detract from the fact that it is an unsatisfactory state of affairs that the prosecution of an appeal, where the appellant is in custody, should take such an inordinate length of time before being set down.

(9) In this matter the appellant was initially represented by Pitje and Lekabe Attorneys. It is not clear when their mandate was terminated nor when the Legal Aid Board commenced acting on behalf of the appellant.

Irrespective of these factors, it is incumbent on the Director of Prosecutions to diligently and expeditiously prosecute all appeals, more so, where an appellant is not released on bail pending the determination of his or her appeal.

(10) The Supreme Court of Appeal had occasion in the case of *S v Heslop 2007 (1) SACR 461 to* express its displeasure at the laxity and the unreasonable length of time it took the National Director of Prosecution's office to set down that relevant appeal. In the aforementioned judgment, the Supreme Court of Appeal cited in support of its injunction the case of *S v Senatsi and Another 2006 (2) SACR (SCA) at para 11.* The passage *in para 11* is worth reiterating for emphasis:

'In the appeal before us Mr Van der Vyver for the State assured us that steps have now been taken in the DPP's office to ensure that appeals, especially those lodged by unrepresented accused, are not lost in the system. One can imagine the prejudice that would have occurred if the appeal by the two appellants had been upheld or sentences of less than the period they have already served had been imposed. The office of the DPP is urged to ensure that such delays do not occurred in the future. Such delays deny justice to the persons concerned by preventing a speedy disposal of their cases. Sadly, this is not the first time this has occurred. In S v Joshua this Court had to deal with a case in which there was a delay of some six years before the appeal was heard. Fortunately, the accused was out on bail in that case. Not so in the present matter. Such delays are to be avoided at all costs.'

(11) The injunction that the office of the Director of Prosecutions should expeditiously prosecute appeals is predicated on the potential prejudice to the appellant where such an appeal is upheld. It is intended to effectively minimize the period the appellant is to spend in custody awaiting the outcome of his appeal.

(12) The failure by the Director of Prosecutions to act with precipitated haste in prosecuting an appeal such as the present, may in the case of the appeal succeeding, be regarded as an infringement of an appellant's constitutional rights under *section 33 and 35 of the Republic of South Africa Constitution Act No 108 of* 1996, namely, to just and fair administrative action, and the right to have one's trial, which includes the appeal, to be concluded without unreasonable delay.

(13) The court suggests that the Director of Public Prosecutions, the Legal Aid Board and the Johannesburg Justice Centre, institute mechanisms and safeguards, to ensure that appeals, particularly those of persons in custody, are prosecuted with extreme urgency in order to minimize unreasonable delays which may possibly infringe an appellant's constitutional rights to a speedy trial.

(14) The Registrar is requested to forward a copy of this judgment to the National Director of Prosecutions, the Legal Aid Board and the Johannesburg Justice Centre, drawing the court's remarks to their attention.

FACTUAL BACKGROUND

(15) The appellant's conviction arose from an incident which occurred on 1 November 1999 at plot 468 Zuurbekom. The deceased and his wife resided as tenants on the plot which they rented from the Molotos, the family of Makgoba. On the evening of 11 November 1999 at about 20h00 Mrs Moloto, the landlady, sent the appellant to collect rent from the deceased.

(16) The deceased advised the appellant that he did not have money and that he was waiting for his wife to receive her salary which he intended utilizing for payment of the rent. The appellant returned and made a report to Mrs Moloto. She then instructed Makgoba and the appellant to return to the deceased and collect rent from him.

(17) Upon their arrival and after Makgoba had knocked on the deceased's door and having gained entry thereafter, an exchange of words ensued between the deceased and Makgoba. The deceased requested Makgoba to leave his dwelling. Makgoba and the deceased thereafter became embroiled in a quarrel and attacked each other. The appellant stood up and pulled the deceased away from Makgoba.

(18) The deceased's wife grabbed Makgoba and pulled him outside. The appellant did not release the deceased. Makgoba returned into the dwelling and produced a firearm, cocked it and shot the deceased. There is a material dispute of fact as to whether the appellant pinned the deceased down on the sofa in order for Makgoba to shoot him, or whether the appellant and the deceased fell down on the sofa in an

attempt to stop the fighting. Makgoba and the appellant conveyed the deceased to hospital.

THE APPLICABLE LEGAL PRINCIPLES GOVERNING APPEALS

(19) It is trite that the State has the onus of proving its case beyond a reasonable doubt. There is no onus on the appellant to prove his innocence and as long as his version is reasonably possibly true the appellant is entitled to his acquittal. The State bears the onus to prove that the appellant is guilty of the murder of the deceased on the basis of having made common purpose with Makgoba who discharged the fatal shot that killed the deceased.

(20) In the absence of any misdirections, a court of appeal is bound by the credibility findings of the trial court, unless it is convinced that such findings are clearly incorrect. Mindful of the advantage a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that this court will be entitled to interfere with a trial court's evaluation of oral testimony.
See S v Francis 1991 (1) SACR 198 (A) at 204e

(21) It is settled law that in the absence of demonstrable and material misdirections in the trial court's findings of fact, they are presumed to be correct. They will only be departed from on appeal if the recorded evidence shows them to be clearly wrong.
See S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f and S v Naidoo and Others 2003 (1) SACR 347 (SCA) para [26]; [2002] 4 ALL SA 710 in para 26

(22) It is trite that it is a requirement of the fair trial guaranteed by *section 35(3) of the Constitution of the Republic of South Africa, 1996* that, if a court intends drawing an adverse inference against an appellant, the facts upon which this inference is based must be ventilated and proved during the trial before the inference can be drawn.

THE ANALYSIS OF THE TRIAL COURT'S MISDIRECTIONS

(23) For the appellant to be convicted of murder on the basis of *dolus eventualis* the State had to establish that the appellant had the subjective foresight that Makgoba was in possession of a firearm, that he intended using it or that, there was a possibility he would discharge it against the deceased.

(24) The trial court found that the evidence of Ms Moselane was balanced, fair and extremely objective and that she was a credible and reliable witness. It accepted her evidence. The trial court rejected the appellant's version as not reasonably possibly true and convicted him as charged.

(25) Despite the rejection of the appellant's version, there is still an onus on the State to prove its case beyond a reasonable doubt. The rejection of the appellant's version does not detract from the fact that a determination must be made as to what actually went on in the mind of the appellant for the trial court to justifiably infer that the appellant ought reasonably to have foreseen, and therefore did in fact foresee the possibility of Makgoba causing the deceased's death. Differently stated, the trial court overlooked the fact that the State's version does not

explain what the appellant's subjective state of mind was at the stage when Makgoba discharged the firearm and killed the deceased.

(26) The remarks of *Brand AJA in S v Shackell 2001 (2) SACR 185 (SCA) (2001) (4) SA 1; [2001] 4 ALL SA 279) at para [30]* are particularly apposite in regard to the incorrect approach followed by the trial court:
'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of, an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable, that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step.'

(27) The gravamen of the appellant's defence is predicated upon the fact that;

(a) he was not forewarned that Makgoba was armed and was in possession of firearm;

(b) when he held down the deceased on the sofa, his intention was to prevent a fight between the deceased and Makgoba; and

(c) by his intervention he was not performing any act in common purpose with Makgoba in order to assist him in the killing of the deceased.

(28) A proper analysis of the appellant's evidence reveals that despite intensive cross examination he never deviated from the core of his version. Consequently, it follows that the State has not succeeded in showing that the appellant's version is inherently improbable and therefore not reasonably possibly true, as the following exposition will demonstrate.

(29) The trial court mentioned as the decisive defect in the appellant's evidence the fact that:

"there is the unchallenged evidence of Ms Moselane that the accused was present when Mrs Moloto adopted a threatening attitude to her husband, the deceased…..It is also the uncontested evidence of Ms Moselane that when the deceased had, prior to the incident in question, told Mrs Moloto that they would like to leave since he had to take over his late father's responsibility, she apparently was aggressive and in the presence of the accused told the deceased that Makgoba had a firearm and that she did not know why he did not use it….

(30) Further the trial court stated:

"The accused knew of Mrs Molotos threat to the deceased, made in his presence and that Makgoba had a firearm which he was supposed to use. In our view he must therefore at least been aware of the possibility that Makgoba was armed…."

(31) The cogency and reliability of Mrs Molotos threats or utterances, were never explored in relation to the date on which these were purportedly made or the circumstances under which they were made. What is clear however is that these purported threats or utterings were not made on the 1 November 1999. This is borne out by the State Prosecutor's remarks that: *"Ms Moselane should confine herself to what happened on the evening of the 1st November 1999 at about 20:00."* Consequently, there is no evidence that the deceased was present when Ms Moloto made these threats and utterings, or that he was forewarned that Makgoba was armed.

(32) The trial court misdirected itself in finding that *"after the appellant's report to Mrs Moloto, the question as to what he thought he and Makgoba was supposed to do. Clearly it was not a duplicate visit merely to request payment…..*

On the probabilities we are of the view that the accused, having returned empty handed the first time, went to extract payment by intimidation and, if needs be, by violence and that is why Makgoba accompanied him." There is no evidence to sustain this inference. The appellant was only a servant of Mrs Moloto and was not directly involved in the problem regarding the failure by the deceased to timeously pay his rent. The appellant's involvement was only to accompany Makgoba.

(33) The trial court misdirected itself by inferring that the appellant's concession that "*he and Makgoba discussed their mission on their way to the deceased's place"* refers to and confirms the notion that the

accused and Makgoba intended to extract payment from the deceased by intimidation and violence. There is no evidence substantiating this inference as the only reasonable inference that can be drawn from the facts. No evidence was led as to any agreement between the appellant and Makgoba to extract the rent from the deceased by force.

(34) The trial court misdirected itself in finding that: *"the accused was forewarned that Makgoba had a firearm, but irrespective of whether he was forewarned or not, he must have seen Makgoba produce it or point it at the deceased which he, the accused was busy holding and he must have heard it being cocked as Ms Moselane did. In our view it is inconceivable that the accused, witnessing and being party to the assault on the deceased, having seen Makgoba with the firearm in the course of such assault, and hearing it being cocked, did not foresee the possibility of the death of the deceased being caused by the discharge of such firearm and yet the accused persisted with the common purpose [which at the very latest was at that stage between the accused and Makgoba to assault the deceased, whatever else might have transpired previously] did not let go of the deceased, did not remonstrate with or warn Makgoba, and certainly at no stage sought to disassociate himself from the common purpose."*

This conclusion is pure speculation. It was dark in the house and it was quite possible for the appellant not to have been aware of all of Makgoba's actions.

(35) Ms Moselane testified that at the stage when the accused held the deceased's hands behind his back when Makgoba was assaulting the

deceased, she grabbed the former from behind and dragged him outside. When Makgoba returned, it was only then that he produced a firearm from his sock, cocked it, went straight to where the deceased was lying on the sofa, shot him whilst the appellant was holding him down. Thus, according to her, the firearm was only produced for the first time outside the house, something the appellant would not have been able to see while he was inside the house.

(36) The fact that the appellant was holding the deceased's hands behind his back at the stage when Makgoba was dragged out of the dwelling, does not conclusively establish a manifestation by the appellant that he made common purpose with Makgoba to kill the deceased. The possibility that the appellant was restraining the deceased from following Makgoba outside the dwelling in order to avenge himself against Makgoba's assault cannot be excluded. Neither can the appellant's exculpatory explanation that his actions were motivated by his desire to stop the fight between the deceased and Makgoba be excluded.

(37) In *S v Sigwahla 1967 (4) SA 566 (A) at 570B-E* Holmes JA expressed himself thus in relation to subjective foresight:

1. *The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as dolus eventualis, as distinct from dolus directus.*

2. *The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus pater-familias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum probandum is dolus, not culpa. These two different concepts never coincide.*

3. *Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.*

(38) In *S v Bradshaw 1977 (1) P.H. H60 (A)* Wessels JA admonished that a court should guard against proceeding too readily from *"ought to have foreseen"* to "*must have foreseen*" and then to by necessary inference "*in fact foresaw*" the possible consequences of the conduct enquired into.

(39) In my view this is one instance where the trial court did not heed Wessels JA's admonition, and consequently misdirected itself by finding that the appellant subjectively foresaw the possibility, and recklessly acquiesced in the resulting consequences, of Makgoba producing a firearm and discharging same.

(40) Consequently the State evidence has failed to establish all the elements of the doctrine of common purpose as enunciated in *S v Mgedezi 1989 (1) SA 687AD.* Although the appellant was present at the scene of the crime and was aware of the assault on the deceased it has not been shown beyond a reasonable doubt that by holding the deceased's hands he intended to make common cause or was performing an act of association with the conduct of Makgoba who was assaulting the deceased or that he intended to kill the deceased.

(41) All in all, if regard is to be had to the principal shortcomings in the State's case and the misdirections in the judgment of the trial court, both factual and legal, the guilt of the appellant has not been proved beyond reasonable doubt

(42) In the premises, the appeal is upheld and the conviction and sentence are set aside.

Signed at Johannesburg on the February 2009.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

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CLAASSEN J

JUDGE OF THE HIGH COURT

I agree;

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MALAN J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 2nd FEBRUARY 2009

DATE OF DELIVERY OF JUDGMENT:3rd FEBRUARY 2009

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