7/12/2017

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A244/2017

(1) REPORTABLE: ~~YES~~ / (NO)
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/(NO)
(3) REVISED.

07/12/2017 .....

In the matter between:

ABDUL RANA RAUF	FIRST APPELLANT
MUHAMMAD SHABBIR	SECOND APELLANT
and	
THE STATE	RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

[1] The Honourable Mr Justice Baqwa convicted the appellants on 28 July 2016 and sentenced them on 14 October 2016 in the High Court, Pretoria, on charges of kidnapping, murder and unlawful possession of a semi-automatic firearm and live ammunition. On the count of

kidnapping the appellants were sentenced to two years imprisonment and on the count of murder, the appellants were sentenced to life imprisonment. The appellants were sentenced to respectively 5 years and 1 year imprisonment on the charges of possession of the semi-automatic firearm and the live ammunition.

[2] The appellants, with leave of the court *a quo*, now appeal against their convictions and sentences.

[3] A number of issues relating to the findings of the court *a quo* are raised in respect of the aforesaid convictions. These include, in particular, the issue of hearsay evidence accepted by the court *a quo*, the reliance on the circumstantial evidence led by the State and the findings of fact in that regard. The appellants also take issue on the rejection of the second appellant's defence of *alibi* and the finding of common purpose in respect of the commission of the relevant offences.

[4] It is to be noted that although both the appellants were granted leave to appeal their convictions and sentences, the heads of argument filed on their behalf and the oral submissions made at the hearing of the appeal, were primarily directed in respect of the second appellant. None were presented exclusively in respect of the first appellant. The first appellant had conceded that he was present on the premises when the deceased was moved to the place where his body was later found and that the first appellant accompanied the driver of the particular vehicle. It would follow that the convictions and sentences in respect of the first appellant stand to be confirmed.

[5] The Honourable Baqwa, J, gave a well-reasoned and comprehensive judgement on each of the issues raised by the second appellant on appeal.

[6] On the issue of the admission of hearsay evidence by the court *a quo*, counsel for the appellants submitted that the court *a quo* had erred in

not considering certain of the requirements of s 3(1)(c) of Act 45 of 1998. In this regard, the criticism primarily relates to the issue of the existence of a feud between the deceased and the second appellant. In particular, the court *a quo* is criticised for not dealing with the evidence led on the part of the second appellant that no feud existed between the second appellant and the deceased. In this regard, the court *a quo* held that direct evidence was led that the deceased had laid a charge of harassment with the police against the second appellant. The deceased's wife, Ms Fourie, testified to that and further testified that she was privy to threats made on behalf of the second appellant against the deceased. She also testified that the second appellant had followed the deceased in a threatening manner. The latter led to the charge of harassment being laid. To the extent that the court *a quo* relied upon hearsay evidence in respect of the existence of a feud between the deceased and the second appellant, such hearsay evidence is corroborated by the direct evidence of Ms Fourie who testified to her personal experience of such feud. That evidence of Ms Fourie clearly gainsays the evidence led on the part of the second appellant that a "cordial" relationship existed between him and the deceased.

[7] In my view, there is no merit in the submissions made on behalf of the appellants on this issue. The court *a quo* dealt comprehensively with all the requirements relating to the admission and acceptance of hearsay evidence. There is accordingly no merit in this ground of appeal.

[8] The second and third grounds of appeal relate to the alleged inconsistencies of the evidence in respect of the type of vehicle involved in the disappearance of the deceased and the description of the people involved therein. In this regard, there is no merit in the alleged criticism raised. The respective witnesses were clear that a white vehicle was involved and were agreed upon the description of the people involved. Whatever the number of the persons involved, the

witnesses were agreed: that men in police uniform were present, that three African men were present who also participated, that an argument ensued prior to the deceased leaving in the white vehicle and that the registration number of the said vehicle was written down. It was not disproved that a white vehicle was parked at the second appellant's business premises the evening prior to the deceased's disappearance.

[9] The submission that the deceased left with the aforementioned people in the white vehicle of his own volition is contrary to the direct evidence that an argument ensued prior to the deceased leaving. It is also contrary to the uncontested fact that a person who telephonically identified himself to Ms Fourie as a police officer and who had threatened harm to the deceased should the latter not leave South Africa. The circumstances surrounding the deceased's departure recorded above was such that it drew the attention of the security guard and that of Mr Coves and raised their suspicion. A complaint of a missing person in the person of the deceased was laid as a result of the circumstances under which the deceased left with the persons in the white motor vehicle.

[10] There is no merit in the submission of the alleged lack of evidence in respect of what happened after the deceased had left under the circumstances recorded above. Likewise there is no merit in the submission that the plight of the deceased cannot be attributed to the appellants. In this regard, the body of the deceased was found two days after his disappearance under the aforesaid circumstances and against the background of the feud between the second appellant and the deceased.

[11] Submissions were made on the part of the appellants that the evidence relating to the vehicle track marks found near the deceased's body is of no consequence. In that regard, Warrant Officer Bekker testified that he had made plaster casts of all the tracks found and that it matched

conclusively with all the tyres on the Hyundi vehicle in which the deceased's blood was found. The alleged concession that Warrant Officer Bekker would have made that there are many vehicles that have the same tyre make, is opportunistic. The concession did not go beyond the statement that it is correct that many vehicles are equipped with a similar tyre make. It was established that the plaster casts had matched that of the specific vehicle. Counsel for the appellants did not press the matter and wisely so. There is no merit in this ground of appeal.

[12] It was common cause that the blood of the deceased was found in the Hyundai motor vehicle. That is the vehicle that arrived at the second appellant's business premises into which a body was placed and of which the tyre tracks were found at the place where the deceased's body was later found. That same vehicle was later retrieved from another address where it was stored. It was further common cause that the said vehicle belonged to the third accused. The first appellant admitted his presence at the second appellant's business premises and that he actively participated in moving a "body" from the said premises in the said vehicle. The mere fact that no forensic evidence was retrieved from the aforesaid premises does not militate against the objective facts recorded earlier. Counsel for the appellants sought to suggest that the concession in respect of the report documenting the presence of the deceased's blood having been found in the aforementioned Hyundai motor vehicle, was wrongly made, and hence should not be held against the appellants. Counsel for the appellants conceded that he is bound by that concession and did not press the issue further. The appellants had personally signed the admissions document in which the concession was contained. Furthermore, Mr Makgopa was unperturbed in his evidence, namely that what was removed from the premises, was a body. It was stiff and at the end of the "package" black shoes projected. Black shoes were found next to the deceased's body.

[13] In my view there is no merit in the fifth ground of appeal.

[14] The sixth ground of appeal is directed at the rejection of the second appellant's defence of *alibi*. It is trite that an accused is not obliged to prove his defence of *alibi*. See in this regard *R v Biya* 1951(4) SA 514 (A). However, the defence of *alibi* is to be considered against the context and totality of the evidence presented.

[15] The second appellant suggests that he could not have been at his business premises at the time when the suspicious circumstances arose as testified to by Mr Makgopa and Ms Putter. He testified that he was at another business of his. He relied on the evidence of a defence witness in support of his *alibi*. The second appellant's *alibi* does not hold water for what follows.

[16] The evidence of Mr Makgopa and Ms Putter clearly place the second appellant at his place of business, the *Crazy Store*, at the relevant time. Both the aforesaid witnesses know the second appellant well. Both testified to the peculiar circumstances under which they observed the second appellant at the relevant premises. The prevailing circumstances relating to the visibility and vantage points were good. Neither of the two witnesses had any reason to falsely implicate the second appellant. I have already dealt with the further evidence relating to the vehicle used and the findings in that regard. The court *a quo* correctly rejected the defence of *alibi* as false and not possibly true. There is no merit in this ground of appeal.

[17] The seventh and eighth grounds of appeal have no prospect of success. The evidence presented in respect of the circumstance under which the deceased left in the white vehicle and his whereabouts until his body was found at the dumpsite, with which I have dealt with above, clearly indicate and support the fact that the deceased had not entered the white vehicle of his own volition and was clearly detained against his will. Furthermore, the alleged absence of "facts of any fight

or argument or shooting at the *Crazy Store*" is of no consequence for what is said above. The evidence clearly shows that the deceased was taken against his will and was later found shot. The evidence of Mr Makgopa clearly identifies the second appellant as one of the persons who placed the deceased's body in the Hyundai. The second appellant even drove that vehicle out of the yard.

[18] The criticism levelled at the findings of the court *a quo* in respect of common purpose is unwarranted. The court *a quo* dealt with the requirements in respect of common purpose comprehensively and cannot be faulted. It is clear that persons under the control of the second appellant took the deceased against his will and dumped the deceased's body at the instance of the second appellant. There is consequently no merit in this ground of appeal.

[19] In my view, the court *a quo* correctly rejected the appellants' versions as false and not possibly true.

[20] Counsel for the appellants did not press the appeal against the conviction on the charges of unlawful possession of a semi-automatic firearm and ammunition and correctly so.

[21] It follows that the appeals against the convictions cannot be upheld.

[22] There remains the issue of sentence. In this regard counsel for the appellants submitted that the appellants are rehabilitative and that lesser sentences would be appropriate.

[23] In my view, the court *a quo* considered all the circumstances in respect of sentence and did not materially misdirect itself in any regard. In that instance, this court cannot interfere with the sentences imposed.

[24] It follows that the appeals against sentence cannot succeed.

I propose the following order:

(a) The appeals against conviction and sentence are dismissed.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

I agree

C P RABIE
JUDGE OF THE HIGH COURT

I agree

P MOKOENA
ACTING JUDGE OF THE HIGH COURT

It is so ordered

On behalf of Applicant: J P Marais
Instructed by: Mkhabela Attorneys

On behalf of Respondent: Ms Mosetlha
Instructed by: Director of Public Prosecutions