HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

24/8/17
DATE

SIGNATURE

Case no. A946/14

In the matter between:

J.T. Lekane Appellant

and

The State Respondent

JUDGMENT

RABIE, J

1. The appellant was arraigned as accused 4 before the circuit court held in Klerksdorp on charges of murder, housebreaking with the intent to rob, robbery with aggravating circumstances, conspiracy to commit a robbery and conspiracy to commit murder, both in contravention of section 18 (2) (a) of Act 17 of 1956. The appellant was convicted on the two conspiracy counts and sentenced to 10

years on each count. The sentences were ordered to run concurrently. Leave to appeal against the convictions was granted by the Supreme Court of Appeal.

2. The State's case was that between 1 January 2012 and 14 January 2012 the accused and other unknown persons planned to rob the deceased, Mr A.S. Du Toit, on his farm in the district of Ventersdorp. The robbery was perpetrated on 14 January 2012 and during this incident the deceased was killed and his wife and sister-in-law assaulted. The deceased died as a result of blunt force trauma to the head.

3. Accused 2, 3 and 5 were also convicted with the appellant. The original accused 1, Mr Mosenyegi, testified on behalf of the State in terms of section 204 of the Criminal Procedure Act. None of the accused testified on their own behalf and closed their respective cases after the closing of the State's case. In order to convict the appellant the court a quo mainly relied on the evidence of Mr Mosenyegi as well as on a statement by accused 5 which was allowed into evidence in terms of section 31 of the Law of Evidence Amendment Act, Act 45 of 1998. The trial court found that the statement corroborated the evidence of Mr Mosenyegi. The court a quo found there to be overwhelming evidence of a conspiracy to murder and to commit a robbery with aggravating circumstances.

4. It is firstly necessary to refer to the aforesaid statement by accused 5 on which the trial court relied. The statement, which served as exhibit "L" before the trial court, was made by accused 5 before a Magistrate. It was common cause that the statement contained admissions and did not amount to a confession. The State advocate applied for the statement to be admitted in evidence against the

appellant and the other accused in terms of section 3 (1) (c) of Act 45 of 1998. The statement was allowed in evidence against the appellant and his co-accused.

5. Before this court the appellant relied on the decision of Mhlongo v S; Nkosi v S [2015] ZACC 19 to challenge the admissibility of the hearsay evidence contained in exhibit "L". In that judgement the Constitutional Court, per the unanimous decision of Theron AJ, restated that at common law the extra curial statement of an accused was inadmissible against a co-accused and that in S v Molimi 2008 (3) SA 608 (CC) the court recognised that at common law an admission made to a magistrate or a peace officer by one accused is inadmissible against another accused. The court considered the relaxing of the rule in certain decisions which found that an extra curial admission, but not a confession, by an accused is admissible against a co-accused if the requirements of section 3 of Act 45 of 1998, dealing with the admission of hearsay evidence, are satisfied. The court found that this reasoning cannot be supported and found that although the said Act altered the common law in relation to hearsay evidence, it did not alter or intend to alter the common law in relation to the admissibility of extra curial statements made by an accused against a co-accused. Consequently the court found that both extra curial confessions and admissions by an accused are inadmissible against co-accused. The court declined to consider whether at common law a statement may be admissible if it is an "executive statement" and not when it amounts to a "narrative statement". As exhibit "L" amounts to a "narrative statement", being an account or admission of a past event, the said statement will in any event not be admissible under the common law.

6. It was submitted on behalf of the respondent that account may nevertheless be taken of the statement where it corroborates the evidence of a single witness. I do not agree. The very purpose of disallowing such a statement as evidence against the co-accused militates against this proposition.

7. Since the trial court relied for the conviction of the appellant on, inter alia, the statement of accused 5 which was inadmissible, this court has to decide the guilt or otherwise of the appellant based on the remaining evidence presented to the trial court.

8. The only evidence against the appellant came from the evidence of Mr Mosenyegi. The question before this court is therefore, whether on the evidence of Mr Mosenyegi, the court of quo was correct in finding that the appellant was part of a conspiracy to murder and rob the deceased.

9. A conspiracy is an agreement between two or more persons to commit or to aid or procure the commission of a crime. See JM Burchell: SA Criminal Law and Procedure, volume 1, page 367, third edition (1997). As the agreement between the parties constitutes the unlawful conduct, they must not still be negotiating towards an agreement. See R v Walker (1962) Crim LR 458.

10. As a single witness as well as an accomplice the evidence of Mr Mosenyegi must be approached with caution. Before discussing the truthfulness and reliability of the evidence of Mr Mosenyegi I shall briefly refer to certain salient features of the events leading up to the murder and robbery of the deceased.

11. Mr Mosenyegi had worked on the farm of the deceased since July 2012. It seems that when the deceased moved a very heavy safe into his house on the farm Mr

Mosenyegi and some of the other employees formed the idea that there must be something valuable inside the safe. It seems that later, a policeman by the name of Chico, who did some security guard work for the deceased, mentioned that the deceased received a lot of money for his previous farm and the idea seems to have arisen that there was a lot of money in the house of the deceased. The idea to rob the deceased seems to have been originally discussed between Mr Mosenyegi, Chico and accused 3.

12. As time went by other persons also became involved in the process and the main question to be answered at the trial was whether it can be found that the appellant was eventually part of a conspiracy to rob the deceased on the 13th of January 2013.

13. It is no easy task to establish the true course of events and what happened at each event and which persons were involved during such meetings. This is mainly so because the evidence of the chief state witness, Mr Mosenyegi, differed during his evidence and chief and his cross examination and also differed from a statement made by him to the police. The Magistrate himself described these contradictions as "serious contradictions" in the evidence of Mr Mosenyegi. Consequently, the events which I shall now refer to are subject to the aforesaid difficulties with the evidence of Mr Mosenyegi.

14. In the early morning of 21 December 2011 or the 25 December 2011 Mr Mosenyegi met accused 3 and 5 who said that they wanted to speak to him. He was in a hurry and consequently they met after work on that day. With them was a person named Rasta. They discussed the issue of him taking photographs and obtaining a plan of the house of the deceased where Mr Mosenyegi was working

but they said that they would meet again in future. No agreement was made to commit any robbery.

15. On the 31 December 2011 Mr Mosenyegi again met with accused 3 who told him that he had been informed that there was money in the house of the deceased and that he wanted Mr Mosenyegi to assist him in getting that money. Mr Mosenyegi agreed .

16. On 1 January 2012 Mr Mosenyegi went to accused 3's place where the appellant arrived. The appellant gave him a paper which looked like a construction paper relating to the business of the appellant. The appellant told him that he wanted a job at the deceased's place where he had heard that work was available.

17. On 4 January 2012 accused 2 and Rasta came to Mr Mosenyegi's place of residence. Accused 2 told him that he wanted to be part of the plan to take money from the deceased's place and that he had a firearm.

18. Later on 4 January 2012 Mr Mosenyegi went to the residence of accused 3 and found him with the accused 2 and Rasta. They arranged to meet the next day.

19. However, they only met at accused 3's place on 7 January 2012 and Rasta and the appellant were present. He showed accused 3 and Rasta and the appellant the photos he had taken on his cell phone of the deceased's residence. One of the photographs depicted an upper story window as well as a garagedoor which Mr Mosenyegi thought could be the points of entry when the house was being broken into. During this meeting the appellant also telephoned people from Pretoria who had experience with cameras and the breaking of locks. The people from Pretoria apparently indicated that they would arrive the next day. Mr

Mosenyegi later added that during this discussion it was said that he should put up a stepladder and open a window but nothing further was said about who had to do anything and what was supposed to happen. Nothing was discussed as to what would happen if they encountered resistance.

20. I must add that during cross-examination Mr Mosenyegi's evidence was different in that he testified that the appellant telephoned the people from Pretoria on the 1st of January and that he saw the appellant again on 9 January.

21. On 8 January 2012 Mr Mosenyegi went to the house of accused 3 where the appellant and the people from Pretoria were supposed to arrive. Late that night the people from Pretoria arrived. Herman and Jabu were two of the five people that arrived from Pretoria. It appears from earlier evidence of Mr Mosenyegi that the appellant might also have been present but from his subsequent evidence it did not occur until a later date. The people from Pretoria wanted to see the place of the deceased but Mr Mosenyegi did not want to go and went home.

22. On 9 January 2012 some of the people from Pretoria came to Mr Mosenyegi's residence and asked him whether he was prepared to go and show them the place of the deceased that evening. Thereafter they went to the residence of accused 3 where the appellant also arrived. Apparently, during a discussion, the people from Pretoria mentioned that guns would be used if the deceased would wake up while they were breaking in . They travelled in two vehicles of which one was driven by the appellant. According to Mr Mosenyegi the purpose of the visit was to establish how they would enter the farm if they go there in future. At the residence of the deceased the passengers of the vehicles got out and moved towards the house of the deceased. The vehicles did not enter the premises of

the deceased. The appellant was driving one of the vehicles. They realised that the deceased and his wife were not yet asleep. After some discussion, and possibly some argument amongst them, as to whether they should go into the house or not, they decided to move away. They were picked up by the vehicles and they drove back to town. According to Mr Mosenyegi he informed the others that he did not want to be a part of their plans any longer.

23. The next interaction that Mr Mosenyegi had with the others was approximately a week later on 14 January 2012 when he met accused 3. Mr Mosenyegi had been at the place of the deceased to work but was turned away by the police as a result of the death of the deceased. While at the farm Mr Mosenyegi saw the appellant drive past with accused 3 and Rasta in a bakkie motor vehicle. After Mr Mosenyegi arrived home he went to the accused 3 and enquired from him what had happened since he had heard that the deceased had been killed. Accused 3 telephoned one of the people from Pretoria, Herman, to hear what had happened because they heard that the deceased had been killed. Herman informed him that he knew nothing of the incident.

24. According to Mr Mosenyegi he heard that police officers were involved who actually visited the farm of the deceased to see what the area and the house looked like. It seems that the accused 3 was the main person involved.

25. During cross-examination Mr Mosenyegi testified that the roles that any particular person would play during a proposed break-in, was not discussed.

26. During cross-examination on behalf of accused 3 Mr Mosenyegi testified that on 1 January 2012 he met not only with accused 3 but also with the appellant. This is

in conflict with his previous evidence in chief when he said that he only met with accused 3.

27. According to Mr Mosenyegi he had never seen the appellant in the presence of accused 2 or accused 5.

28. The Magistrate found that there was overwhelming evidence of a conspiracy to murder and to commit a robbery with aggravating circumstances of which the appellant was a part. For purposes of this finding the court found the state witnesses to be credible and reliable.

29. On the evidence of Mr Mosenyegi the appellant was only present on the 7th and 9th of January 2012. On 7 January he apparently telephoned persons in Pretoria who could assist in a robbery. On 9 January he drove one of the vehicles which transported the people to the farm of the deceased. However, Mr Mosenyegi was quite adamant during cross-examination that the visit to the deceased's farm on 9 January 2012 was nothing more than a reconnaissance of the area in order to decide whether a robbery should be perpetrated or not. There was no evidence that at that point an agreement had been reached that the farm would be robbed by those concerned and at best for the prosecution the evidence can be construed as still a negotiating phase and not a conspiracy.

30. It appears that on 9 January some of the persons wanted to do the robbery there and then but the majority was against the idea and consequently they left the farm. It seems to have been a group decision to leave the farm. It is clear that there was a dispute among those who had gone to the farm, even among the people from Pretoria, as to whether they should proceed to rob the place or not

and that they eventually decided to go home. Furthermore, the people from Pretoria, who were supposedly the ones who would have played the major role in any intended robbery, went back to Pretoria. There is no evidence that they ever again become involved in the robbery that was committed on 14 January 2012.

31. There is also no evidence that subsequent to the 9 January 2012 the appellant was ever involved in any further planning or the execution of the robbery which took place on 14 January 2012. There is also no evidence as to who were involved in the robbery on that day or who were involved in the planning thereof.

32. Consequently, on the evidence there appears to have been no agreement to rob the farm on 9 January 2012 nor of any agreement that the robbery would be perpetrated on a subsequent date. There is consequently no evidence of a conspiracy to commit the robbery and, for that matter, the murder of the deceased, on 13 January 2012 which involved the appellant. The last that the appellant had been involved, on the evidence of Mr Mosenyegi, was on 9 January 2012 when a reconnaissance of the area was made.

33. Apart from the above there can be no doubt that Mr Mosenyegi was a most unreliable witness. His version of events was not consistent and I agree with the remark by the trial court in respect of the contradictions between his evidence in chief, in cross examination and in the statement given to the police. Consequently, in approaching the evidence of Mr Mosenyegi with caution, as one should, since he is a single witness as well as an accomplice, it cannot be found that the evidence of Mr Mosenyegi had been clear and satisfactory in every material respect and consequently it cannot be found that the State had proven its case against the appellant beyond a reasonable doubt.

34. Consequently the appeal should succeed and the conviction and sentence be set aside.

35. In the result, the following order is made:

1. The appeal succeeds and the conviction and sentence of the trial court ~~is~~ are set aside.

C.P. RABIE

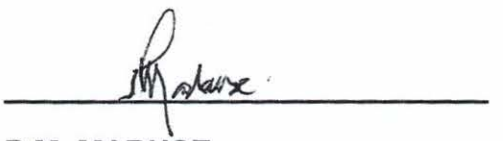
JUDGE OF THE HIGH COURT

I agree

L.M. MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree



P.M. MABUSE

JUDGE OF THE HIGH COURT