REPUBLIC OF SOUTH AFRICA

24/2/2017

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

A 15/16

GD CASE NO: CC32/14

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

24/02/2017
DATE

[redacted]
SIGNATURE

In the matter between -

KEOBAKILE F BABULI	Appellant 1 (Accused 3 in court *a quo*)
ITUMELENG J MOLEBATSI	Appellant 2 (Accused 4 in court *a quo*)
WILLIAM LESOLE MALEFO	Appellant 3 (Accused 5 in court *a quo*)
KHOTSO BENNET KADI	Appellant 4 (Accused 6 in court *a quo*)

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Respondent 1
DEPUTY DIRECTOR OF PUBLIC PROSECUTION, NORTH GAUTENG, PRETORIA	Respondent 2

JUDGMENT

STRYDOM, AJ

[1] During the early morning hours of 14 December 2012 and at or near Alabama, in the district of Klerksdorp, Mosimaneotsile David Chika was shot

and murdered outside his house. The four appellants and co-accused were arrested and, in relation to the events described above, were charged with a contravention of section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956, i.e. a conspiracy to commit murder, and with murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997. Of the eight accused that stood trial, six were convicted, including the four appellants who were accused 3, 4, 5 and 6 respectively, in the court *a quo*. They were convicted on both counts as was accused 1. Accused 7 was only convicted on the murder count. Accused 2 and 8 were acquitted after the State's case was closed pursuant to an application in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[2] The first and second appellants were sentenced to effective imprisonment for 15 years and 18 years respectively, and the third and fourth appellants were both sentenced to life imprisonment.

[3] The four appellants applied for leave to appeal to the court *a quo* but leave to appeal against their convictions and sentences was refused. On 17 June 2015 the Supreme Court of Appeal granted the appellants leave to appeal to this court against their convictions and the sentences.

[4] At the hearing of the appeal before this court, the appellants applied for condonation for the late filing of their heads of argument. Such condonation was granted.

[5] In respect of the conspiracy and murder charges it was alleged in the indictment, read with the summary of substantial facts, that the deceased was the regional secretary of Dr KK Kaunda District Municipality and a member of

the African National Congress (ANC). He was responsible for compiling a list of nominees who were supposed to attend the ANC national conference to be held in Mangaung starting on 15 December 2012. The appellants and the other accused, excluding accused 7, were unhappy with the nomination list drawn by the deceased of delegates who were supposed to attend the conference. As a result of their unhappiness, meetings were held to discuss the elimination of the deceased. The State alleged that accused 7 was the person responsible for firing the shots from his licenced firearm that killed the deceased. The State averred that all the accused acted in the furtherance of a common purpose in the commission of the murder offence and for purposes of the conspiracy count it was alleged that certain meetings were held before the deceased was killed, during which it was discussed how and when the deceased would be killed.

[6] Considering the judgment of the court *a quo* the appellants were principally convicted on the evidence of Sambeko Simphiwe Mpandana (Mr Mpandana) and Cynthia Mpho Tlako (Ms Tlako) and pursuant to extra-curial statements made by accused 1 and 7. These witnesses were single witnesses concerning their evidence and the court *a quo*, after reference was made to the cautionary rule applicable when the evidence of a single witness is considered, accepted their evidence. The court *a quo* found that there existed corroboration for their versions on the totality of the evidence.

[7] Accused 1 and 7 made extra-curial statements to the police in which they implicated themselves as well as the appellants in the commission of the offences. The court *a quo* placed some reliance on the contents of these

statements to find corroboration for the version of Ms Tlako and to conclude that the appellants together with the other accused conspired to kill the deceased. That this was done is evidenced by the following statements in the judgment of the court *a quo* made in relation to all accused that were convicted:

"*Evidence of the statements and pointing out made by accused 1 and 7 respectively, will be considered together with all the evidence presented.*"

and

"*The plan that was agreed upon according to the statement of accused No. 1 was to employ the services of a hit man to kill the deceased. This plan, as it will become clear hereafter, was ultimately implemented. Therefore accused 1, 3, 4, 5 and 6 are guilty on count 1.*"

[8] Before dealing with the evidence of Ms Tlako and Mr Mpandana to establish whether their evidence could be accepted to convict the appellants, the reliance of the court *a quo* on the extra-curial statement of the co-accused to convict the appellants should be considered.

[9] Section 219(A) of the Criminal Procedure Act, 51 of 1977, expressly provides that:

"Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him in criminal proceedings relating to that offence: Provided ..."

[10] The wording of this section cannot be interpreted to mean that admissions made extra-curially by a co-accused can be relied upon for the conviction of another accused. Further, our Constitution does not permit the admission of an extra-curial statement by an accused against a co-accused as it infringes upon an accused's fundamental rights which are protected by the Bill of Rights. See *S v Mhlongo and S v Nkosi* 2015 (2) SACR 323 (CC). The Constitutional Court in this matter also confirmed the correctness of the decision of the Supreme Court of Appeal in *S v Litako & Others* 2014 (2) SACR 431 (SCA). In this matter the court rejected the notion that an extra-curial statement of an accused could be admitted against another accused in terms of section 3 of the Law of Evidence Amendment Act, 45 of 1988. It overruled its previous decision in S v Ndhlovu and Others 2002 (2) SACR 325 (SCA) where an extra-curial statement of one accused was admitted in terms of section 3 against another accused. The court in S v Litako *supra* at paragraph [67] as part of the *ratio decidendi* of the decision found that an extra-curial confession or admission of one accused is inadmissible against another accused. The court found as follows:

"Considering the rationale at common law for excluding the use of extra-curial admissions by one accused against another, it appears to us that the interests of justice are best served by not invoking the Act for that purpose. Having regard to what is set out above, we are compelled to conclude that our system of criminal justice, underpinned by constitutional values and principles which have, as their objective, a fair trial for accused persons, demands that we hold, section 3 of the Act notwithstanding, that the extra-curial admission of one accused does not constitute evidence against a co-accused and is

therefore not admissible against such co-accused."

[11] The common law position has thus been restored in our law of evidence and this court, not only agrees with the pronounced legal position, but is bound by the decisions referred to herein above.

[12] In S v Litako *supra*, at paragraph [65], and S v Mhlongo *supra* at paragraph [39] references were made to an exception to the rule to exclude the extra-curial statements of co-accused. . The exception relates to "*executive statements*" by an accused that may be admissible against a co-accused if it were made in the furtherance of a common purpose or conspiracy. This is not applicable *in casu* as the statements which the court *a quo* relied upon in his judgment were statements in the form of a narrative of events that already took place. Moreover, it was found in S v Mhlongo *supra* at paragraph [39] that-

"*There must be other evidence (aliunde) to establish the existence of a common purpose before the statements can be taken into account.*"

[13] Accordingly, any reliance the court *a quo* placed on the extra-curial admissions and statements of accused 1 and 7, which were not confirmed by them in court, to convict the appellants was wrong in law and will not be considered by this court to ascertain whether the State has proven beyond reasonable doubt the guilt of the appellants. This court will have to consider the admissible evidence to establish whether the convictions of the court *a quo* should be sustained.

[14] The court *a quo*, correctly in my view, relied on the extra-curial statements of

accused 1 and 7 to convict these accused. In the statement of accused 7 he admitted he shot the deceased. Moreover, accused 7's licenced firearm was by way of ballistic evidence connected to the killing of the deceased. This is an important aspect as, apart from the contents of the statement of accused 7, there exist no other evidence linking accused 7's actions to that of the appellants.

[15] This court should now consider the remaining evidence to consider whether the appellants were correctly convicted on the conspiracy and murder counts.

[16] Mr Mpandana testified that he was a member of the ANC. He knew the appellants and on 13 December 2012 he had met with the first, third and fourth appellants at Shoprite. The fourth appellant had told him that the deceased must *"go out"*. He testified that he did not know whether this meant that he must go as secretary, be killed or just be removed from his position. The court *a quo* specifically clarified the interpretation of the phrase *"go out"* and formally recorded that it meant that the deceased must "*come out*". The court *a quo* held that what the fourth appellant apparently told Mr Mpandana did not advance the State's case but the court *a quo* accepted his evidence more specifically that he saw the first, third and fourth appellants together at Shoprite on 13 December 2012 during the course of the morning.

[17] The evidence of Mr Mpandana further revealed that he was at some stage accused by the police as having killed the deceased. It is also common cause that he wanted money for his testimony and claimed an amount of R250 000 for repeating his statement in court. In his statement to the police it is noted that he stated that the fourth appellant said to him that the deceased must be

killed. He denied in court that this is what he told the police. He insisted that he only said to the police that the fourth appellant told him that the deceased must "*go out*". When confronted with the discrepancy between his testimony and his statement he said that the statement was incorrect.

[18] Considering that Mr Mpandana was a single witness concerning the meeting at Shoprite, the court *a quo* erred in finding that this evidence was satisfactory in all material aspects and could be accepted. His evidence materially differed from his statement he made to the police. When he was consulted before he testified in the court *a quo* he still insisted that he wanted money as a reward for repeating his evidence contained in his statement. It then later transpired that he did not repeat the contents of the statement but that the fourth appellant said something in Shoprite which was not specific relating to the killing of the deceased. In my view, the court a quo could have placed no reliance on the evidence of Mr Mpandana. Evidence of any witness who expects a reward for providing his or her testimony in court should be considered with circumspection. The reason is obvious. The reward may provide motivation to state that which the promisor of the reward would like a witness to say which may be untruthful. Moreover, even if his evidence was accepted it did not advance the state's case, except that it to some extent, contradicted the alibi defences of the first, third and fourth appellants.

[19] For purposes of considering this appeal this court is then left with only the evidence of Ms Tlako. This court must consider whether the court *a quo*'s reliance on her evidence was legally tenable to sustain a conviction in relation to any one of the appellants.

[20] Ms Tlako testified that she knew the appellants but had only met the second appellant on 11 December 2012. She testified about three meetings attended by the appellants on 11, 12 and 13 December 2012. She testified that on 11 December 2012 she had been involved in protest action concerning the removal of shacks. During a meeting under a tree the second appellant had spoken about the people who were supposed to be killed. According to her comrade Cheka was one of the people that he said had to be killed.

[21] On the next day during the morning of 12 December 2012 she met the appellants and accused 1 in the yard of a school. She overheard the second appellant telling accused 1 that they should meet accused 8 at River Lodge on the next day to finalise their plan to kill Mr Cheka.

[22] She then testified that on 13 December 2012 one Moteng and Mokete came with accused 2's car to pick up accused 1. She then went with them to River Lodge. They arrived there at approximately lunch time. The appellants, accused 2 and accused 8 were in the room standing in a circle. Accused 7 was not there. She could see inside the room as she was about 30 paces away. Later it transpired that she saw the people inside the room when she walked past the sliding doors of that room and that her position at the swimming pool was such that she could not look into the room. This placed a question mark over her reliability as to the identity of the people she could observe in the room standing in the circle. This identification was further rendered questionable when it was put to her that accused 2 could not have been at River Lodge at that time as he was in hospital and the relevant hospital records were produced. The reliability of her evidence was further

compromised when it was pointed out to her that her statements to the police contained different times when she made her observations at River Lodge. Later accused 1 who was with her was called into the room. He went in. She could not hear nor did she know what the people inside the room were discussing. She left River Lodge with accused 1 and Motseng at about 3pm. She later asked accused 1 what was discussed inside the room. He told her that in the meeting he was promised money to kill comrade Cheka by the fourth appellant and that the third appellant would have provided him with a firearm to use. She then told accused 1 that he should not get involved as they were already in trouble. She then testified that on 14 December accused 1 phoned her and told her that she must watch television as they have killed Cheka.

[23] During cross examination it transpired that she had made five statements to the police. In her first statement she stated that she went to River Lodge at 15h00. In court she said that she went at 13h00 and left at 15h00. In a later statement she said that she went to River Lodge twice during the same day, the second time was at 15h00. There were further discrepancies. One of her statements was also incorrect when it referred to the accused persons sitting together in the room at River Lodge. In her evidence in court she said they were standing although she could not say how many people were in the room and what their positions were. In one of her statements she omitted to mention accused 8. She attributed these inconsistencies to the police who wrote the statements. In the court *a quo's* judgment the court went so far as to find that the police interfered with the statement of witnesses *"to create false impression that witnesses contradict themselves"*. This finding is based

on conjecture and is not supported by any reliable evidence. At the end of the day it was the witness that contradicted herself on material aspects which rendered her reliability and credibility questionable.

[24] In an attempt seemingly to support the evidence of Ms Tlako the court *a quo* enquired from the legal representatives whether accused 1,2 and the second appellant denied that this witness was at River Lodge on 13 December 2012 around lunch time. They did not deny it as their versions were that they were not there at all. This admission the court elevated to some form of corroboration in support of the evidence of Ms Tlako. It never was the defence's case that Ms Tlako was not at River Lodge on th13th. It was their case that they were not there and the acceptance that Ms Tlako was at River Lodge does not make her evidence more reliable or credible.

[25] Ms Tlako was a single witness, whose testimony was not corroborated in any material way by any other admissible evidence. What accused 1 told her afterwards what was discussed at River Lodge will amount to hearsay evidence concerning the appellants and although the court *a quo* placed some reliance on what was said, this evidence remains inadmissible as against the appellants. Similarly, what accused No. 1 later told her on the 14th of December 2012 over the telephone is inadmissible evidence against the appellants and need not be further considered in this judgment.

[26] In terms of section 208 of the Criminal Procedure Act a court can base its findings on the evidence of a single witness. It has been found in many cases of the Supreme Court of Appeal that section 208 of the Act did not do away with the cautionary rule requiring that the evidence of a single witness had to

be substantially satisfactory in every material respect or at least there should be some corroboration for the testimony of the single witness. See: S v Mahlangu and Another 2011 (2) SACR 164 SCA at para 21; Jansen v S (236/2015) [2016] ZASCA (26 August 2016).

[27] The evidence of Ms Tlako was not satisfactory in all material respects. There were serious contradictions which go to the heart of the case. In my view, these contradictions have rendered her evidence untrustworthy, less credible and unreliable. It cannot be found that her evidence is satisfactory in all material respects. Even the trial judge must have had his concerns as to the reliability of Ms Tlako's evidence as he granted the discharge applications of accused 2 and 8 after the case for the state was closed despite the evidence of Ms Tlako to the effect that they were part of the meeting at River Lodge.

[28] It should be added that even if the admissible portions of the evidence of Ms Tlako was accepted i.e. that on the 11th of December 2012 the second appellant said that the deceased must be killed, that on 12th December 2012 the second appellant told accused 1 in the presence of the other appellants that they must meet with accused 8 to finalize the plan to kill the deceased and that they in fact met on the 13th of December 2012, the only reasonable inference would not be that at River Lodge they came to an agreement to commit the murder. Without admissible evidence as to what was said at this meeting it will remain pure conjecture whether an agreement to kill the deceased was finalized and therefore concluded. There can be a conspiracy to act unlawfully only if there is a definite agreement between at least two persons to commit a crime. See: S v Cooper 1976 (2) SA 875 (T) at 879. It

has been found in paragraph [13] above that the court *a quo* could not have placed any reliance on the extra-curial statement of accused 1 to conclude that an agreement was reached to kill deceased.

[29] The state relied on a common intention between the accused to kill deceased to convict them on the murder count. What the court has done was first to find that a conspiracy to kill the deceased was proven, then the court relied on the statement of accused 7, which is inadmissible against the appellants, to conclude that the appellants formed a common purpose to kill and in fact caused the killing the deceased. Without a finding that the state has proven the conspiracy, and without further evidence, a finding of a common purpose cannot be sustained. The court *a quo* relied on the extra-curial statements of accused 1 and 7 in support of its inference that the appellants and accused 1 obtained the services of accused 7 to commit the murder. Apart from accused 7's statement there was no evidence whatsoever which indicated that the appellants and accused 1 agreed with accused 7 that he should perform the act of killing the deceased.

[30] The court *a quo*, in its judgment drew the inference that the appellants gave accused 7 money to kill the deceased. This inference could not have been drawn to convict the appellants. It was not the only reasonable inference that could be drawn from the proven facts. For instance, just to refer to one other reasonable inference, accused 7, who used his own firearm to shoot the deceased, could have acted on his own volition.

[31] Accordingly, and irrespective of the shortcomings in the accounts of the appellants, we are of the view that the state's case fell short of proving the

guilt of the appellants beyond reasonable doubt.

[32] The following order is made: The appeals of the four appellants are upheld and the convictions and sentences are set aside.

[redacted]

Strydom AJ

Moshidi J [redacted]

Meyer J [redacted]