IN THE NORTH WEST HIGH COURT

MAFIKENG

CAF 9/13

In the matter between:

DONALD MOLATLHEGE MNCUSENI **Appellant**

and

THE STATE **Respondent**

FULL BENCH – CRIMINAL APPEAL

HENDRICKS J, KGOELE J, CHWARO AJ.

DATE OF HEARING : 25 OCTOBER 2013
DATE OF JUDGMENT : 21 NOVEMBER 2013

FOR THE APPELLANT : Adv. Skibi
FOR THE RESPONDENT : Adv. Rantsane

JUDGMENT

KGOELE J:

[1] The appellant and two others were arraigned at Ga-Rankuwa Circuit Court charged with the following charges:-

Count 1 - Murder
Count 2 - Robbery with aggravating circumstances
Count 3 - Unlawful possession of firearm (contravention of section 3 r/w other relevant sections of Act 60 of 2000)
Count 4 - Unlawful possession of ammunition (contravention of section 90 r/w other relevant sections of Act 60 of 2000)

[2] Former accused entered into a plea and sentence agreement and was consequently found guilty and sentenced. At the time the matter against the appellant was heard the former accused 2 was still at large as he had breached the condition of his bail. Appellant pleaded not guilty to all the charges levelled against him and was found guilty as charged on all of them. He was sentenced as follows:-

Count 1 - Twenty (20) years imprisonment
Count 2 - Twelve (12) years imprisonment
Count 3 - Six (6) years imprisonment
Count 4 - Three (3) years imprisonment

The court ordered the sentences in Count 2,3 and 4 to run concurrently with the sentence imposed in Count 1. The appellant was granted leave by the court *a quo* against both conviction and sentence, hence this appeal.

[3] For the sake of relevance and as a result of the outcome of the appeal in this judgment, only the grounds on conviction as set out in the notice of appeal are enumerated hereunder:-

"AD CONVICTION

1. The presiding Judge in the court a quo erred in law and/or fact in its finding that the state succeeded in proving guilty of the Appellant beyond a reasonable doubt based on the following:-

1.1 The court erred to find that the evidence of a single witness, Mr Mataba who was also an accomplice witness was clear and satisfactory in all material aspects.

1.2 The court erred by allowing the state to cross-examine the accused on the evidence of previous conviction, during the trial and such cross-examination proved to be prejudicial on the Appellant

1.3 The court also erred in law and or fact to find that there was a corroboration in the evidence of Mr Mataba as the comparison which was made by the forensic ballistic and the bullet which was found from the body of the deceased was said to be indeterminable as to whether it was fired from the said firearm. Mr Mataba is very dangerous to rely his evidence only as he admitted that he gave away his firearm after the incident and he got it back and wanted to use it again to commit other crimes.

1.4 Mr Mataba's evidence could not be relied upon as he brought up new version about the planning to hijack which he never mentioned in his previous statements he made, Exhibit D, E and F.
Ie. In the warning statement, confession to the magistrate & the statement section 105A.

1.5 The court erred to find that the state has proved beyond a reasonable doubt that there was a plan to hijack the deceased and his bakkie on the night in question.

1.6 The state failed to prove that the appellant was aware that Mr Mataba was in possession of a firearm on the date in question. The fact that the appellant conceded that he was aware that some months or year before the incident Mataba was having a firearm cannot be easily inferred that on the night in question the appellant must have been aware or foresaw a possibility that Mr Mataba might have been armed with the said firearm.

1.7 The court didn't deal with the evidence as to why the appellant was also found guilty for joint possession of firearm and ammunition.

1.8 Mr Mataba's evidence didn't testify that he showed he appellant ammunition at any state during the day or during the night of the robbery and murder.

1.9 There is no evidence that the appellant had the intention to possess the firearm through Mr Mataba and that there is no evidence that Mr Mataba had the intention to possess the firearm on behalf of the group.

1.10 The court a quo erred to find that the appellant's version is not reasonably possibly true."

[4] The following were common cause and constitute the background in this matter:-

On the night of the incident the appellant, former accused 1, who in the court *a quo* testified on behalf of the state and former accused 2 were at a tavern called Hunters at Brits. They all left the said tavern

when it closed and went to look for transport with the aim of going to their respective homes at Soshanguwe. A certain bakkie (Nissan 14 000) arrived at the time they were hitchhiking and when it stopped, all the three climbed into it. It was driven by the deceased. Whilst on their way the car stopped. Upon the car stopping, former accused 1 fired a shot from the back of the bakkie which hit and killed the deceased instantly. He was loaded at the back of his bakkie and the bakkie was driven further to a spot at Mmakau where his body was dumped in the veld. The said bakkie was further driven to Soshanguve and was parked at the house of a certain man called "Bra Thabo". Although the deceased's bakkie was found at a police pound later, its parts had been sold.

[5] The state called four witnesses and the appellant also testified. There is largely an agreement between the state's version of what happened and the appellant's version save for the following:-

- knowledge on the part of the appellant of the presence of a firearm;
- the intention to rob and kill the deceased;
- the driving of the bakkie by the appellant from the scene of incident to where the body of the deceased was dumped.

[6] Amongst the several findings the court *a quo* made in regard to the credibility of the appellant, the court *a quo* preferred the evidence of the former accused 1 to that of appellant in as far as whether he did drive or not the deceased's car from the scene of incident to where the body was dumped.

[7] The crux of the appellant's appeal was mainly based on the ground that the court *a quo* erred by allowing the appellant to be cross-examined on his previous convictions. Advocate Skibi on behalf of the appellant, submitted that this amount to an irregularity which is so gross to such an extent that it vitiates the whole proceedings. According to him, this ground is a key issue in the appeal as a whole and therefore the appeal can solely be decided on this issue alone.

[8] He emphasized the fact that the introduction of the appellant's criminal record disadvantaged him as it attacked his character. The fact that he said he could not drive do not *per se* justify the state in cross-examining the appellant on his criminal record as it shows that he is a criminal. He referred to section 211 of the Criminal Procedure Act 51 of 1977 (**CPA**) as a basis for his submission in this regard.

[9] Advocate Rantsane appearing on behalf of the state conceded, correctly so in my view, to the submissions by Advocate Skibi.

[10] Section 211 of the CPA reads as follows:-

> "Except where otherwise expressly provided by this Act or Child Justice Act 2008, or except where the fact of a previous conviction is an element of any offence with which the accused is charged. Evidence shall not be admissible at criminal proceedings in respect of which any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he has been so convicted." (own emphasis).

[11] *In casu*, it is not in dispute that the court *a quo* allowed the state to use the previous conviction of the appellant in cross-examining him in

order to discredit him and to prove that he can drive a vehicle. This was done during cross-examination when the appellant mentioned that he cannot even start a motor-vehicle. This was a response by him, on the allegation that was made by accused no. 1 on behalf of the state that he (the appellant) drove the car when the deceased body was going to be dumped in the bush.

[12] It is obvious that the point in dispute here between the state and the defence was whether the appellant could drive or not. His ability to drive was therefore relevant to this dispute and the State with a view to proof that, presented his previous conviction contrary to **section 197** (which relates to the cross-examination of the accused with regard to his character) and **section 211** of the **CPA**. See also:- **S v Mavuso 1987 (3) SA 499 (A).**

[13] The situation was aggravated by the fact that the court *a quo* further used this irrelevant and inadmissible evidence in evaluating the evidence of the appellant and ended up rejecting it. This is borne by the following remarks that are found in the judgment of the court *a quo:-*.

> **"The fact that the accused was able to drive a motor vehicle and had paid a fine also afford some corroboration, to a small degree, for Mr Mataba's evidence.**
>
> **It also shows that the accused is not to be believed when he says he cannot drive a vehicle and when he says he did not drive the deceased's bakkie.**

This is one of those rare occasions where, although there is criminal corroboration or perhaps even none as regards the two crucial issues, knowledge of the firearm and intention to commit a crime, the accomplice was a good witness, whereas the accused was a bad witness. I am satisfied about the reliability and veracity of Mr Mataba's evidence. In the result I find the accused guilty on all four counts."

[14] The consequence of the above is that it was used against him to rule in favour of the state regarding one of the crucial issues that were before the trial court to wit "**the intention to commit a crime**". It was furthermore one of the tools which was used to make a finding that he is a liar or a poor witness (or "bad" as the court *a quo* remarked). After all, the fact remains that the previous conviction the accused was convicted of is not an element of the offence with which the accused is charged with in this matter as provided for by section 211 of the CPA.

[15] Consequently, I come to the conclusion that the irregularity renders the proceedings in the court *a quo* not fair against the appellant. I fully agree with submissions of both Advocate Skibi and Advocate Rantsane that consideration of this ground alone is sufficient to enable this court to set aside the proceedings of the court *a quo*.

[16] The following order is thus made.

16.1 The appeal is upheld;

16.2 The conviction and resultant sentence of the court *a quo* are hereby set aside;

16.3 The appellant is to be released immediately if he is in custody consequent to this matter only.

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A M KGOELE
JUDGE OF THE HIGH COURT

I agree

_____
R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree

_____
O K CHWARO
ACTING JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT : Mafikeng Justice Centre
FOR THE RESPONDENT : Director of Public Prosecutions