

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KETA RICHARD MKHATYWA APPELLANT

AND

THE STATE RESPONDENT

CORAM : VILJOEN, BOTHA et VIVIER, JJA

HEARD : 6 NOVEMBER 1987

DELIVERED : 1 DECEMBER 1987

J U D G M E N T

VILJOEN, JA

On the night of 22 May 1983 one Reuter

Marthinus Voster, a Coloured man, ("the deceased")

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was murdered at a lonely spot some distance from Vosloorus in the district of Alberton and his motor vehicle, a red Audi, was driven away from the scene.

Some time thereafter three people viz Meshack Mangele ("Meshack"), Johannes Mtombela ("Johannes") and Stephen Hlongwane ("Stephen") appeared before the Court in the Witwatersrand Local Division on charges of murder and robbery involving the death of the deceased and the taking of his car. Abel Gwebu ("Abel") who had initially been charged with the others was used as a witness for the State. The appellant who could, according to the police, not be found at his usual address, did not appear with the others. The outcome of that case was that all the accused were found

not/.....

not guilty and were discharged. The appellant was subsequently arrested and appeared in the Court a quo before Vermooten AJ and assessors on charges of murder and robbery involving the same facts. The main State witnesses were Abel and Stephen. Meshack and Johannes had, it was alleged in evidence, left for Natal and could not be traced. The appellant was convicted of murder and robbery and, no extenuation having been found, was sentenced to death by the Court on the murder charge and received a sentence of 7 years on the robbery charge. With the leave of this Court, leave having been refused by the Court a quo, the appellant appeals against his conviction on both charges.

The evidence discloses that during the

afternoon/.....

afternoon of Sunday 22 May 1983 at about 16h00 or 16h30 the deceased left his house at Reiger Park, Boksburg, on the pretext, as he told his wife, to try and find and pick up labourers who could assist his two sons who were builders and to transport them to Pretoria where the sons were building at the time. He left in his red Audi motor vehicle. According to his wife he had with him a satchel in which there was a black wallet containing about R1 500, made up of R500 which he had received from his sons and R1 000 which he, as an insurance agent, had collected from, I presume, policy holders. His part-time business was to assist his sons in the building trade.

His movements, as related by Stephen, were

that/.....

that he arrived at a certain plot near Elsburg where he met Stephen who had previously worked for the deceased's sons. He told Stephen that he was looking for a certain Petrus but when the deceased was informed by Stephen that Petrus was not there that afternoon, Stephen, at the deceased's request, accompanied him to another plot to look for one Dumisane and a certain girl. They found only Dumisane's young brother there from whom the deceased enquired whether a certain Coloured girl did not live there. Abel emerged from the house and came to the car. The deceased said he wanted a beer and he gave Dumisane's young brother R2 to buy him a beer. The youngster obliged and returned with a beer and some change.

The/.....

The deceased did not drink the beer there and then but suggested to Stephen and Abel that they should go to Vosloorus for liquor and girls. The three of them drove to Vosloorus in the deceased's Audi. When they arrived at a T-junction on their way from Elsburg to Elspark a white van with three occupants approached from the opposite direction. Driving the van was the appellant, Stephen's cousin, and his two passengers were Meshack and Johannes. Stephen stopped the appellant and told him that they were on their way to Vosloorus where they hoped to be able to find liquor. The appellant offered to escort them to a place where liquor was available and told Stephen to cause the deceased to follow him. They followed the appellant

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to Vosloorus where they stopped at a hostel. The appellant and his passengers alighted from the white van and approached the red Audi which had stopped behind the white van. Stephen alighted from the Audi and when, at the appellant's call, he walked up to the appellant he overheard the appellant saying to his companions Meshack and Johannes that he wanted the red Audi. The appellant thereupon handed the keys of the white van to Stephen and told him to take Abel along and to drive the van to his aunt's place in Vosloorus and to wait there. His aunt's place was the house where the appellant lived. He called Abel, the two of them got into the van and he drove to the house where the appellant lived and parked the vehicle outside/.....

outside the house. There they waited. They became drowsy and fell asleep. Some considerable time later they woke up when somebody knocked on the window of the van. It was the appellant and his two companions, Meshack and Johannes. He also noticed a girl who arrived in their company in the red Audi which was driven by the deceased. He and Abel were told to get out of the van and he was told by the appellant to lock the van. The appellant told him that he had arranged with the deceased that they should all drive up the street to fetch Johannes' van. All of them except the girl got into the Audi. He and Abel got in in front with the driver, the deceased, and the appellant, Meshack and Johannes sat on the back seat. They drove/.....

drove off, ostensibly to go and fetch Johannes' van.

The appellant and Meshack directed the deceased. They

drove on through various built-up areas but suddenly

he noticed that they were driving through open veld

outside a location. The deceased then wanted to know

where they were going. He obviously became suspicious

and stopped the car whereupon the appellant told him that

if he refused to drive, he, the appellant, would do so.

The deceased got out by the driver's door and the

appellant moved from the back seat through the opening

between the two bucket seats to the front but also

alighted from the car through the driver's door. At

the same time Meshack also left the car through the

left back door. The two of them then grabbed the

deceased, /.....

deceased, took the car keys away from him and placed him in the boot of his own car. Abel was told to go and sit on the back seat. He, Stephen, remained on the front passenger seat and the appellant took over as driver. They travelled for some considerable distance and eventually arrived at a lonely spot outside the town of Alberton, off the tarred road. There the appellant stopped and he, Johannes and Meshack got out and opened the boot of the car, took the deceased out and dragged him some distance away to a spot amongst reeds. He, Stephen, and Abel also got out of the car and followed the others to see what they were doing. Stephen saw that the three of them had the deceased down on the ground where they were kneeling next to him./.....

him. The appellant had a large knife in his hands. When the appellant saw Stephen he asked him where he was going. . . . The appellant threw the Audi's keys at him and told him to drive it to the tarred road and wait for them there. He noticed that the appellant took something out of the deceased's pocket. What it was he could not tell. As he was instructed to do, Stephen turned round and he and Abel, who was close behind him, returned to the Audi and drove it to the road where they waited for the others. After some time the three arrived at the motor car and, with the appellant driving, they left the scene. On the way back to his aunt's house the appellant warned Stephen and Abel not to tell anybody what they had

seen./.....

seen. Should they do so they would suffer the same fate as the deceased. When they arrived back at his aunt's house the appellant handed him R20,00, told him to fill the van with petrol and to keep it until he, the appellant, needed it. He and Abel drove off in the van to Elsburg where they lived. He saw the red Audi following the van for a distance before it turned into and entered the hostel premises. Two days later, on the Tuesday when he and Abel sat in the van near their place of employment with their girl friends, they were arrested. They were pointed out to the police by one Moses Tsabalala who had seen him and Abel leaving from Dumisane's house with the deceased in his red Audi. As a result of information given by him and

Abel/.....

Abel, Meshack and Johannes were arrested. The police were looking for the appellant but could not find him. He and Abel pointed out the spot where they had seen the other three kneeling beside the deceased and there the police found the body of the deceased. The post mortem report reflected the cause of his death as a "penetrating incised wound of the left carotid artery and jugular vein." Where and under what circumstances the red Audi was found was not revealed in the evidence. What does appear from the evidence is that the widow of the deceased identified the Audi some days later at the Boksburg police station as her late husband's car.

Abel Gwebu substantially confirmed the

evidence/.....

evidence of Stephen. There were very few discrepancies. When cross-examined Abel admitted that at the s 119 proceedings pertaining to the trial in the other Court he had pleaded guilty to both robbery and murder but he explained in the Court a quo that he did so because he was in the company of the others that night. He confirmed that he was used in that Court as a State witness. It appears that he had been warned in terms of s 204 of Act 51 of 1977 but that he was not granted an indemnity in terms of that section at the end of the proceedings.

Testifying in his own defence the appellant admitted that he was on the scene of the slaying of the deceased but he put the blame on Stephen. He told

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the Court that on that Sunday he first went to the hostel to visit his friends Meshack and Johannes and afterwards left with these two friends in Meshack's white Audi motor car to visit a cousin of his, one Simon Mgobo, at Natalspruit. During the day he imbibed a substantial quantity of liquor. At the hostel he drank beer with his friends and at his cousin's place they sat drinking until sunset. They left his cousin Mgobo at about 19h40 and Meshack drove him home where he arrived at about 20h00. Meshack and Johannes immediately left for the hostel. He entered his house. After a while Stephen knocked at the door and entered the house. He was alone. Stephen announced that he had come to visit but he was not going to stay/.....

stay long because he was still going to Natalspruit. He invited the appellant to go along. The latter at first declined the invitation because, as he told Stephen, he had had enough to drink and wanted to sleep. Eventually, however, Stephen's persistence triumphed and he was persuaded to go along when Stephen promised him that it was not necessary for him to go into the house to drink; he could remain sitting in the motorcar. The appellant's wife, who required to know when Stephen would be bringing her husband back, was, according to his evidence, assured by Stephen that they would not be away for long. They left in a red Audi vehicle driven by the deceased. Stephen sat in front. In the car, apart from/.....

from himself and Stephen, there were Abel and Stephen's girl friend whose name he did not know. The red Audi drove off in the direction of Natalspruit. In the centre of Natalspruit location Stephen told the deceased to stop. The car stopped, Stephen alighted and entered a certain house. After ten minutes he returned to the motorcar and, directed by Stephen, the deceased drove in the direction of Tokoza, drove past it and onto a farm road. Stephen told the deceased to stop. The car stopped, Stephen alighted and called the appellant to get out of the car. He did so and Stephen preceded him to a spot some distance from the car. There, out of earshot of the occupants of the car, Stephen told him that he wanted to leave the deceased/.....

ceased there because the deceased for whom he had been working owed him money. Upon the appellant enquiring what Stephen had in mind the latter told him: "You do not know. You are going to see." Stephen told the appellant to get back to the motorcar. He did so. Stephen followed him. When the latter reached the motorcar he called the driver and Abel Gwebu. He, the appellant, got into the motorcar. Stephen, followed by the deceased and Abel, walked some distance from the car. At a distance of about 12 paces from the car Abel and Stephen suddenly assaulted the deceased. Abel grabbed him round the body and Stephen produced a knife and stabbed the deceased on the left side of the neck. During the attack Stephen's girl friend, who/.....

who was sitting in the motorcar, asked Stephen what they were doing to such an elderly person. In response Stephen threatened to interrupt his attack on the deceased and deal with her in the same manner as he was dealing with the deceased. After having stabbed the deceased Stephen and Abel carried the body some distance away, left it there and returned to the car. Stephen drove the car from there and took him home where he arrived at about 21h00. After Stephen and the others had left he told his wife what had happened.

To corroborate his version the appellant called as his witness his wife, Emily. She told the Court that during the morning of that Sunday the accused told her that he was going to Natalspruit to visit.

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He did not say whom he was going to visit. He left and only returned at about 19h30 that evening. He returned in a white motorcar. She was unable to tell the Court who the driver of the vehicle was. She only saw it standing outside. She asked the appellant who the people were and he told her it was Meshack Mangele and somebody. The appellant entered the house and sat down. After a while, at about 20h00, Stephen came in. The appellant asked him why he came to visit him so late because he wanted to go to bed. Stephen said he just came to see the appellant. He was going past to Natalspruit and he would like the appellant to accompany him. He did not say why. She said nothing. They left. She did not see what their means of transport/.....

port was. They left at about 20h15. The appellant returned at about 21h30. It was just after she had got into bed. The appellant told her that Stephen Hlongwane and a friend of his had injured the person with whom they had been. He did not supply details. He only said they had injured somebody. She never saw a white bakkie parked outside their house that night. She saw no money in the possession of the appellant. The next day, being a Monday, the appellant went to work in Natalspruit. He never, during the period after the events of that Sunday night, stayed at any place other than their home.

The learned Judge a quo gave the following reasons for the Court's conviction of the appellant:

"Now/.....

"Now according to the accused Stephen's motive for killing the deceased was that the deceased owed him money, he had been working for the deceased. It seems to us, however, that this is a statement very difficult to accept.

Firstly there is no evidence of Stephen demanding his money from deceased before killing him.

Secondly Stephen testified that the father of the two sons, Freddie and Hermanus, owed him no money, but one son did owe him money and he had paid him. It seems to us inherently improbable that one would kill for a debt and thereby destroy your chance of getting your money.

The second feature of the accused's evidence is this, that on his version Stephen whom he had not seen for two months and whom in any event he saw irregularly, merely came to his house that night to persuade the accused, who was most unwilling, to come and be a witness to see how Stephen killed the deceased, and that is how the accused manages to get himself onto the scene. This is in our opinion so highly improbable that we reject it as false.

A third feature, the accused's evidence in this

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court is that Abel and Stephen assaulted the deceased. Abel grabbed the deceased round his body while Stephen stabbed him to death. Yet the story is completely different and Abel is left out entirely, both in the accused's statement to the magistrate, EXHIBIT E, in the Magistrate's Court, as well as before the magistrate, EXHIBIT F.

To make it worse, in trying to get out of his dilemma, he says he could not remember Abel's name, but nowhere does he say a Black male whose name I do not remember. In our opinion the whole story about Stephen killing the deceased is a fabrication.

Another feature, he never reported to the police and he lied by saying he did not know it was his duty to do so. But in the next breath said he knew according to law he should have reported to the police. I have remarked on other features in his evidence.

The accused is a lying witness, we have no hesitation in rejecting his evidence.

As far as Emily Mkwanazi is concerned she was an unsatisfactory witness. I have pointed to features in her evidence already.

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In addition, it is a matter for comment that the accused was only arrested in April 1985, some 2 years after the incident, so Emily had only then, that is two years later, to reflect on what had happened in May 1983. Moreover Emily is his wife, it is only human nature to try to help her husband, particularly on such serious charges as these. There is a further fact that she sat in court from Monday when the trial began. We are unable to place any reliance on her evidence, we reject it."

The Court a quo evaluated the evidence of Stephen and Abel as follows:

"Stephen and Abel must be regarded as accomplices and we scrutinised their evidence in that light. Both Stephen and Abel impressed us favourably. They corroborated each other in all material respects. Nor were we able to detect any sign of hostility between them on the one hand and the accused on the other.

There are, however, some differences in their evidence. For example, on the occasion when the deceased was removed from the boot of the car Stephen says the accused, Meshack and

Johannes/.....

Johannes got out of the car, the boot was opened, deceased came out, they grabbed him.

Abel says accused, Meshack and Johannes got out of the car, the boot was unlocked and the accused grabbed the deceased on the left of the neck and then in front, and they put him down on the ground. The difference in our opinion is so minor as to be of no real importance.

Then secondly, Stephen testified that the accused said to him, "I want this motorcar". Abel did not hear it, but actually it is no wonder because accused had called Stephen away from the car when he said this.

Thirdly, after the stabbing Stephen says the accused and Meshack said to him words to the effect, "You are not to tell what you saw, if you do you will go the same way as your friend."

While Abel says, and these are his ipsissima verba that the accused said, if anyone should say to the police where they had gone they would do the same to us as they had done to the deceased and would kill him. The real difference in the version lying in this, that according to Stephen the accused and Meshack said those words, threatened him that way, but according to Abel the accused was the man who threatened, apparently alone.

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But again it seems to us the difference is insignificant. There are no doubt other differences between Stephen and Abel, but they are of minor importance."

Finally the Court said:

"There is another fact, the accused places himself on the scene when the stabbing took place, that is further corroboration of the evidence of Stephen and Abel.

We have come to the conclusion that we can safely rely upon the evidence of Stephen and Abel. We accept their evidence."

It does seem to be a glaring improbability on the appellant's version that Stephen would come to his house that night to persuade him, who was most unwilling, to accompany Stephen for the sole purpose of witnessing the killing of the deceased by Stephen. On the other hand, it seems equally improbable, that,

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with Meshack, Johannes and the deceased, the appellant would return from wherever they had been since driving away from the hostel, to pick up Stephen and Abel where they were sleeping in the bakkie in front of the appellant's house merely to go and witness the slaying of the deceased by the appellant. This was an improbability which the learned Judge himself realised when, in the course of leading the appellant, counsel for the defence asked him whether, if he had wanted to kill the deceased, he would take Stephen and Abel along as witnesses, the learned Judge commented that "it cuts both ways." In spite of this realisation this improbability seems to have been completely overlooked when the Court gave judgment. It may be that they returned for

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a good reason. One possibility which presents itself is that the appellant returned to fetch a knife but there was no evidence that the appellant had entered his house before driving away with Stephen and Abel as additional passengers in the red Audi. Stephen and Abel might have been awakened only after the appellant had entered and emerged from his house. This, however, is pure speculation. There is no evidence to substantiate such a possibility. Had the girl who was left behind been traced, she might have enlightened the Court as to where they had been and whether the appellant did enter the house upon their return. No effort to trace her appears to have been made. Another curious fact is that, on the evidence of Stephen and

Abel/.....

Abel, the deceased wanted liquor and girls. Yet, when his blood was tested, it was found to have contained 0,01 per cent alcohol only. According to the evidence of Stephen and Abel he had bought one bottle of beer at Dumisane's house. That beer he did not drink there and then at Elsburg but drank it in Vosloorus at the hostel or shared it with Johannes who opened the bottle for him there. That beer might have accounted for the low blood alcohol content, but the entire escapade is shrouded in mystery.

The court a quo was quite right in finding that the appellant lied and in my view, the Court was also justified in concluding that it could not rely on the evidence of the appellant's

wife/.....

wife Emily. That the bakkie played a role in the events of that night appears from the appellant's statement which he made in the magistrate's court during the proceedings in terms of s 115 of Act 51 of 1977 when he said "Ons het 'n motor en 'n bakkie gebruik". If there was other evidence that the bakkie was involved, it might have supplied more corroboration for the version of Stephen and Abel that, on their way to Natalspruit, they met the appellant, Meshack and Johannes in the bakkie at the T-junction. One may speculate that when the appellant left his house that Sunday morning for the hostel at Vosloorus to visit Meshack and Johannes he left in his bakkie. That would amount to a refutation of his evidence that

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he never owned a bakkie and would render it, if not probable then at least possible, that he, Meshack and Johannes left the hostel for Natalspruit in his bakkie and that on their return they were met by the occupants of the red Audi at the T-junction. How he left his house in Vosloorus to go to the hostel has not been properly investigated. It does not appear from the record what distance the hostel is from his house. Judging from the fact that on their evidence Stephen and Abel apparently did not have to travel far from the hostel to get to the appellant's house, it is possible that the hostel might only have been a walking distance away from the house and that the appellant went there on foot. One does not know.

Proper/.....

Proper investigation might have shown him up as a liar in this regard and might have provided some corroboration on the very important issue as to whether his motive was the appropriation of the red Audi.

It was common cause that the bakkie was not registered in the appellant's name. Nor, on the other hand, was it registered in Stephen's name. It might have been a stolen vehicle but some evidence to substantiate the State's case that the appellant had been seen using the bakkie before that day might have been obtained.

Apart from the aspects which I have mentioned there are other disquieting features in the State's case. According to the evidence, Meshack and Johannes left for Natal after their discharge in the previous case/.....

case and could not be traced by the police. The curious aspect, as far as these two gentlemen are concerned, is that the State retained their names on the list of witnesses for the State. They could therefore not have been considered as witnesses for the defence. That they would have advanced the State's case seems to be doubtful because it appears from the record that their defence in the previous case was an alibi. They called one Buthelezi, an inmate of the hostel, it seems, who told the Court that the two were at the hostel at the time they were alleged to have accompanied the deceased and others to the scene of the crime. That would be consistent with the appellant's defence. It can be assumed that they would

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not, if they were called for the State, readily deviate from their previous evidence. Yet the State did not make them available to the defence. This seems to me to be an unwarranted dog in the manger attitude.

The key to the killing of the deceased is the motive therefor. The appellant said that Stephen killed him because, Stephen said, the deceased owed him money. The Court a quo dealt with that and, in my view, gave valid reasons why it could not accept that that was a likely motive for the killing. Stephen said that the appellant coveted the red Audi. That is a likely motive but where is the corroboration? The evidence of Stephen and Abel, it is true, was consistent/.....

sistent in both trial Courts, but from a reading of their evidence one gets the impression that they were not completely frank with the Court and that they went out of their way to exonerate themselves. It is a matter for conjecture whether they themselves were not more deeply involved and did not play a more active role than the one their version suggests. On their own evidence they were found with the white bakkie on the Tuesday which would tend to indicate that the white bakkie was their share of the spoils. If their evidence that the appellant appropriated the red Audi could be accepted without any qualms it would provide proof in support of their version that the appellant who now had the Audi was

prepared/.....

prepared to allow them the use of the bakkie. But the mere fact that they were in possession of the bakkie makes one hesitant to rely on their version without corroboration. And where is the corroboration?

As I have pointed out no evidence was produced that the appellant was seen driving the red Audi after that night. Where it was found and under what circumstances have not been disclosed. Stephen told the Court that when they left the appellant's house in the white bakkie after their return from the scene of the crime, they saw the red Audi following them for some distance and then turning off in the direction of the hostel. If appellant was the driver who, the inference would be, was taking his two friends back to the hostel,

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it would serve to strengthen the State's case. It is, however, not clear from the evidence of Stephen or Abel whether the appellant was the driver or whether Meshack and Johannes were alone in the Audi. That would leave the appellant without any means of transport but how he got to his work and back was never properly investigated. The five of them, the appellant, Meshack, Johannes, Stephen and Abel were, according to the evidence of the latter two, together when the deceased was killed. It seems to me that it would under the circumstances be dangerous for any court to convict the appellant of murder on the evidence of two accomplices, who were obviously deeply involved in the events of that night, without substantial/.....

substantial corroboration. It is true that the appellant places himself on the scene and that he was a lying witness but the weaknesses in the State's case and certain aspects of the evidence of Stephen and Abel leave me with an uneasy feeling that the entire truth has not been told to the Court a quo.

I have come to the conclusion that the Court a quo did not have sufficient regard to the defects in the State's case and should have had a doubt as to whether the State had discharged the onus resting on it.

The appeal succeeds. The order of the Court a quo is altered to read: The accused is found not guilty and discharged on both counts.

JUDGE OF APPEAL

BOTHA)
VIVIER) JJA - concur