REPORTABLE
Case No: 390/94
376/94
639/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

BOY TITI NDWENI — **1st Applicant**
SIPIWE JAMES BHOLO — **2nd Applicant**
SIPHO SAMUEL GAVIN — **3rd Applicant**

and

THE STATE — **Respondent**

CORAM: **SMALBERGER, GROSSKOPF JJA and MPATI AJA**

DATE OF HEARING: 30 AUGUST 1999

DELIVERY DATE: 31 AUGUST 1999

JUDGMENT

SMALBERGER, GROSSKOPF JJA and MPATI AJA:

This is an application for leave to adduce further evidence.

The three applicants, Messrs Boy Titi Ndweni, Sipiwe James Bholo and Sipho Samuel Gavin, were convicted on 20 June 1994 in the Transvaal Provincial Division by Curlewis J and two assessors of three counts of murder and various other charges, all arising from the same incident. The second and third applicants were sentenced to death on each of the three murder counts (since reduced to life imprisonment); in respect of the remaining charges they were both sentenced to substantial periods of imprisonment. The first applicant was sentenced to an effective sentence of 17 years imprisonment on all the counts. The applicants were refused leave to appeal by the learned judge *a quo* with regard to those

convictions and sentences where they did not have an automatic right of appeal. In a very belated application to this Court, following on events to be outlined below, the applicants sought and were granted condonation, leave to appeal against their aforementioned convictions and sentences and confirmation of their right to seek leave to adduce further evidence.

The incident concerned occurred at Eikenhof on the morning of 19 March 1993 when a group of persons who had hijacked a BMW vehicle and compelled its owner, Mr Nelson Mpunge ("Mpunge"), to transport them to Eikenhof, fired upon the five occupants of a stationary vehicle, killing three and wounding two of them ("the Eikenhof attack"). Two of the persons killed, and one of the wounded, were schoolchildren on their way to school. At their subsequent trial, at which the essential issue was the identity of the attackers, the applicants were held to be the persons

responsible. The main evidence against them comprised (1) confessions made by the first and second applicants which were found to have been freely and voluntarily made, and (2) their identification as the perpetrators by certain witnesses of whom Mpunge was the main one. Their alibi defences were rejected by the court *a quo*. There was no other evidence linking them to the attack.

It is common cause that the three applicants have at all relevant times been members of the African National Congress ("the ANC"). On 22 July 1997, more than four years after the incident, and three years after the applicants' convictions, the Azanian People's Liberation Army ("APLA") issued a press statement claiming responsibility for the Eikenhof attack. Subsequent enquiries made on the applicants' behalf revealed that an APLA member, Mr Phila Martin Dolo ("Dolo") had

submitted applications for amnesty to the Truth and Reconciliation Commission ("the TRC") in December 1996 and February 1997. In the latter application he claimed that, in addition to other acts, "I also ordered the Eikenhof ambush where three people were killed". This was subsequently confirmed by Dolo in an affidavit made by him to the applicants' legal advisers on 24 November 1997. In the affidavit Dolo claims that the Eikenhof attack was carried out by a group of four trained APLA members and that he subsequently received reports from them, including two written reports, relating to the attack. None of the persons named by Dolo (by their code names) has come forward and made an affidavit. However, it is claimed on the papers that one of them, Mr Sipho Polite Xuma, also known as Bulelani Xuma ("Xuma"), has telephonically confirmed his involvement to the applicants' attorney, although it is

alleged by the respondent that he has since denied any participation in the attack. The above and other considerations, some of which we shall allude to in due course, have given rise to the present application. The relief sought, on which there is no need to elaborate, is cast in wide terms and involves the calling or re-calling of a number of specified witnesses. Amongst them are Dolo and Xuma.

It is not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified (*S v De Jager* 1965(2) SA 612 (A) at 613 A - B). An applicant seeking to re-open a case and lead further evidence will generally be required to satisfy the following requirements:

> "(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

(See *S v De Jager (supra)* at 613 C - D.)

We do not propose to analyse, or comment upon, the wealth of material placed before us in support of, or in opposition to, the application, much of which is in the nature of hearsay. It would be both unwise and undesirable for us to express a view on disputed and contentious matters which are incapable of resolution on the papers. It will suffice, for present purposes, to set out certain facts which, unless otherwise indicated, are either common cause or not seriously in dispute. They are:

1) Mpunge testified at the trial that the persons involved in the Eikenhof attack told him to "report [to] the police that they are APLA and

that they will strike again".

2) As pointed out earlier, the applicants are members of the ANC; APLA is the military wing of the Pan Africanist Congress ("the PAC").

3) The ANC and PAC are (and were at the time) different and distinct political groupings. Although sharing certain common goals they were generally in opposition to each other.

4) Five prospective witnesses who were in the immediate vicinity of where the shooting occurred made sworn statements to the police between one to four days after the event. Three of them, Bennie Schoonwyk ("Bennie"), Piti (or Pietie) Mthembu ("Piti") and Yvonne Msimango ("Yvonne") were school children aged 15, 14 and 16 years respectively. The other two were Mrs Regina Bonose ("Bonose") and her husband Mr Joseph Nkosi ("Nkosi"). Bennie, Piti and Yvonne were each individually

shown a set of approximately 300 photographs and each one independently identified from them the same two persons as being amongst the attackers. The persons they identified were Xuma and Mr Muzi William Motha ("Motha"). Both Xuma and Motha were known to the police as APLA members. Although there is some dispute in this regard, it would seem that from a set of six photographs shown to them, Bonose identified Motha as one of the attackers while Nkosi stated that he (Motha) resembled one of them. All five persons failed at later identification parades to point out any of the applicants who were present on such parades.

5) In December 1994 Dolo was convicted of murder and various other offences arising out of an attack on two policemen at Diepkloof and sentenced, *inter alia*, to life imprisonment. A variant of an AK-47 rifle

was used in the attack. On 30 July 1997 Captain Brits, a ballistics expert with the South African Police Services, found on testing that the weapon in question had also been used in the Eikenhof attack.

6) As previously mentioned, Dolo claimed in his amnesty application in February 1997 that he had ordered the Eikenhof attack; and on 22 July 1997 APLA publicly claimed responsibility for the attack. Yet as far back as May 1995 two "secret reports" relating to the Eikenhof attack, purporting to be written by APLA members, were seized by members of the South African Police Services in a raid on a so-called "safe house" used by APLA members. Doubts have been raised on the papers as to the authenticity of these reports. It is now conceded that the reports are in Dolo's handwriting, but he apparently claims to have copied them from the original reports submitted to him, which he then destroyed. This was

done, according to him, for security reasons. However, what is beyond dispute is that the reports were already in existence in 1995, more than 18 months before the first claim of APLA's involvement was made.

7) Preliminary security police reports compiled after the Eikenhof attack concluded that APLA was to blame for the attack. In later reports, however, a different conclusion was reached.

8) In the course of an enquiry into the claims made by APLA conducted by a Deputy Attorney-General, Mr Anton Ackermann, Mpunge (whose evidence of identification at the trial revealed some confusion) on 27 August 1997 made a further statement in which, while abiding by his original statement, he alleged the following:

> "I went to two (2) ID-parades. Before the first ID-parade a photograph of Mr Dawid Mokoena was shown to me by a white police official and the police official told me that this is the man that hi-jacked my car and I must go to the ID-

parade to point out the man on the photograph on the ID-parade. I went to the ID-parade and pointed the man out. This man was later released by the police.

5.

Before the second ID-parade a white police official showed photographs of Siphiwe Bholo and Boy Titi Ndweni to me and asked me if I knew them. I said no. He told me that the two (2) persons on the photographs confessed that they were involved in the Eikenhof incident and that I must go to the ID-parade and point the two (2) persons out. I went to the ID-parade and pointed the above-mentioned two (2) persons out."

In a later statement made on 21 May 1998 he retracted these allegations and denied that any photographs had ever been shown to him.

In essence the applicants seek to re-open their trial and lead further evidence (including recalling certain witnesses who have already testified) with regard to whether they, or APLA members instructed thereto by Dolo, were responsible for the Eikenhof attack. The evidence they seek

to lead satisfies requirements (a) and (c) in *De Jager*'s case (*supra*). The common cause facts listed in paras 5, 6, 7 and 8 above, which are materially relevant to the ultimate outcome of the trial, only came to light after the conclusion of the trial. The facts referred to in para 4 were known to the prosecuting authorities at the time of the trial. The witnesses who were not called by the State were made available to the defence. The fact that at the time APLA had not yet claimed responsibility coupled with an apparent lack of knowledge or appreciation on the part of defence counsel that at least three of the witnesses had pointed out photographs of the same persons, and that these were APLA members, provides a reasonably sufficient explanation for the matter not having been pursued to the full by defence counsel. What is important, in our view, is that the facts referred to in para 4 should have been brought

to the attention of the trial court. Whether anyone was at fault in not doing so is something on which we prefer not to comment as the full facts concerning the matter are not available to us.

Requirement (b) in *De Jager*'s case remains to be satisfied. One would normally be sceptical of a claim of responsibility first made nearly four years after the event in circumstances potentially non-prejudicial to its maker (because he is already serving a maximum gaol sentence and has a pending amnesty application). More particularly this would be so where, as is evident from the papers, such claim is (at least in some measure) subject to conflicting reports, characterised by vagueness and inconsistency, open to serious challenge and, furthermore, is unconfirmed on oath by any of the alleged participants in the Eikenhof attack. However, we are not called upon to decide at this stage whether Dolo's

claims are true or not. In *S v Steyn* 1981(4) SA 385(C), Marais AJ, after an exhaustive review of the relevant authorities, came to the conclusion that the test of "a *prima facie* likelihood of the truth of the evidence" meant no more than that, in a matter such as the present, the evidence tendered should *prima facie* reasonably possibly be true (at 392 H). There is much to be said for the correctness of that approach. Whether that is the test, or the correct test is somewhat more stringent is a matter we need not decide. In our view, if proper regard is had to the effect on the evidence which the common cause or undisputed facts we have listed, taken cumulatively, may (not necessarily will) have when it comes to finally weighing up probabilities, drawing inferences and assessing credibility, the test would be satisfied in either instance. In any event, and without elaborating, there are special features present arising from the

unusual circumstances of this matter which would justify, by way of exception, the re-opening of the case. (*Cf S v Myende* 1985(1) SA 805 (A) at 811 E - F.) The dictates of fairness require that all relevant information bearing on the applicants' guilt or innocence should be before the trial court to enable it to determine the true facts, lest there be an injustice either to the applicants or the State.

In the result the applicants have made out a satisfactory case for the relief they seek, although not on the wide terms set out in the notice of motion. The relief will be confined to the terms set out in the order to be made.

It must be emphasised that success in the application does not guarantee the applicants' acquittal in due course. The final outcome of the trial will ultimately depend upon the trial court's impression of the

witnesses who testify and its overall assessment of the relevant facts and probabilities. The evidence sought to be led may not, in the end result, after being subjected to testing and careful scrutiny, prevail against other, more acceptable or persuasive evidence.

The following order is made:

1) The convictions and sentences of the applicants (appellants) on all counts are set aside;

2) The matter is remitted to the trial court

   (i) to allow the applicants to call or re-call some or all of the following witnesses for the purposes of examination or further cross-examination, as the case may be, and to hear their evidence or further evidence to the extent that such evidence is relevant and admissible:

(a) Mr Phila Martin Dolo
(b) Prof Tom Lodge
(c) Mr Letlapa Happy Mphahlele
(d) Mr Sipho Polite Xuma
(e) Capt T J Brits
(f) Mr Bennie Schoonwyk
(g) Ms Yvonne Msimango
(h) Mrs Regina Bonose
(i) Mr Joseph Nkosi
(j) Mr Nelson Mzwamadoda Mpunge
(k) Mr Abel Korope
(l) Capt W M Botha
(m) Insp S J Grundling
(n) Mr Piti Mthembu
(o) Col W C Landman

(ii) to allow, in the exercise of its discretion, either the applicants or the respondent to call any further witnesses whose evidence it (the trial court) considers to be relevant and material to a just determination of the issues between the applicants and the respondent, and;

(iii) to consider the further evidence led, hear argument thereon and give a decision *de novo* on all the evidence.

3) We express the hope that, in the interests of the proper administration of justice, the further proceedings will commence as a matter of urgency and be disposed of as expeditiously as possible.

J W SMALBERGER
JUDGE OF APPEAL

F H GROSSKOPF
JUDGE OF APPEAL

L MPATI
ACTING JUDGE OF APPEAL