THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO: 609/2007

In the matter between

ENRIQUE ABREY LENDOL MOCKE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **MTHIYANE, CLOETE JJA and MHLANTLA AJA**

HEARD: **27 MAY 2008**
DELIVERED: **2 JUNE 2008**

Summary: **Accused convicted of murder by regional magistrate on evidence of single witness – no reasons given nor credibility findings made by magistrate on evidence of witnesses.**
On appeal – this held to be misdirection entitling appellate court to interfere and reassess evidence itself - Conviction and sentence set aside and replaced with one of being accessory after fact to murder.
Sentence – two years of correctional supervision imposed.
Costs – State ordered to pay wasted costs occasioned by non-appearance of its representative on attorney and client scale.

Neutral Citation: **EAL Mocke v The State (609/2007) [2008] ZASCA 80 (2 June 2008).**

MTHIYANE JA

MTHIYANE JA:

Introduction

[1] The appellant was convicted in the Bellville Regional Court on a charge of murder and sentenced to seven years' imprisonment. His appeal to the Cape High Court with leave of the magistrate against both the conviction and sentence failed. The appellant was however granted leave by the court *a quo* to appeal to this court against both the conviction and sentence.

[2] The charge arose from an incident in Ravensmead on Saturday 6 April 2002. On the day in question Ms Maureen Adams ('the deceased'), who lived and worked on the business premises of the appellant's father, Mr William John Mocke, was brutally killed. Her 'common law' husband, Mr Joseph Marshall, lived with her on the premises.

[3] The State alleged that it was the appellant who killed the deceased by stabbing her with a knife or other sharp instrument and by inflicting other acts of violence upon her. The State relied on the evidence of a single witness, one Henry Daniels, a friend of the appellant, who, like him, was 16 years old at the time of the incident. He testified that the appellant had killed the deceased by grabbing her by her arm and stabbing her several times around the neck with a shining object or a pair of scissors. The appellant denied these allegations and averred that it was Daniels who stabbed and killed the deceased.

[4] The magistrate rejected the appellant's version and accepted the evidence of Daniels without giving reasons. In a one page judgment he did not embark on any analysis of the evidence and made no credibility findings on the evidence of the witnesses.

The Principles

[5] The approach which should have been adopted by the magistrate in dealing with the conflicting versions of the appellant and Daniels was articulated by Joubert AJA in a judgment of this court in *S v Guess*[1]

'The magistrate obviously misdirected himself in accepting Makapan's evidence without stating his reasons for believing him and without stating his reasons for disbelieving the appellant and Miss Brown. The correct approach which the magistrate should have adopted in weighing up the evidence of the State and that of the defence appears from the *dicta* of the following two reported cases:

(1) *Per* DE VILLIERS, J.P., in *Schoonwinkel v. Swart's Trustee*, 1911 T.P.D. 397 at p. 401:

"This Court, as a Court of appeal, expects the court below not only to give its findings on the facts, but also its reasons for those findings. It is not sufficient for a magistrate to say, 'I believed *this* witness, and I did not believe *that* witness'. The Court of appeal expects the magistrate, when he finds that he cannot believe a witness, to state his reasons why he does not believe him. If the reasons are, because of inherent improbabilities, or because of contradictions in the evidence of the witness, or because of his being contradicted by more trustworthy witnesses, the Court expects the magistrate to say so. If the reason is the demeanour of the witness, the Court expects the magistrate to say that; and particularly in the latter case the Court will not lightly upset he magistrate's finding on such a point".

This *dictum* was intended for a civil case but it is equally applicable to a criminal case.

(2) *Per* LEON, J., in *S v Singh*, 1975 (1) S.A. 227 (N) at p. 228:

"Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach

[1] 1976 (4) SA 715 (A) at 718E-719A.

a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the creditably of the State witnesses that, therefore, the defence witnesses, including the accused must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond reasonable doubt. The best indication that a court has applied its mind in the proper manner in the above-mentioned example is to be found in its reasons for judgment including its reasons for the acceptance and rejection of the respective witnesses."

Makapan's evidence should be treated with circumspection, since he left the appellant because he had not been paid adequately. On the probabilities of the case it is by no means unlikely that he nurtured a grievance against the appellant.'

[6] Daniels was not only a single witness whose testimony had to be clear and satisfactory in every material respect but he was also implicated by the appellant in the murder. The reasonable possibility of his involvement in the murder is beyond question. In my view Daniels should have been treated as an accomplice even though he was not warned in terms of section 204 of the Criminal Procedure Act 51 of 1977 ('the Act') at the trial. Support for this view is to be found in DT Zeffert, AP Paizes and A St Q Skeen in *The South African Law of Evidence*,[2] where the learned authors say the following:

'In some cases the term "quasi-accomplices" has been used to describe persons who are not technically accomplices but appear to know a good deal about the offence and have some purpose of their own to serve in giving evidence. The reasons for the accomplice rule apply equally to such persons and similar circumspection ought therefore to be shown in dealing with their evidence. The following are examples of quasi-accomplices: fellow members of an illegal organization according to some

[2] 4 ed (2003) p 802.

decisions (but the Appellate Division in *S v Sauls & Others* refused to treat a witness, who had played no part in the alleged crime, as an accomplice, merely because he was a member of the same illegal prison organisation as the accused and, as such, under suspicion); police informers, and persons borrowing money at usurious rates of interest. There is some dispute over whether in such cases the cautionary rule applies as a requisite of procedural law or whether caution is simply dictated by commonsense; but the point is somewhat academic since, as we have seen, the cautionary rule is itself no more than an admonition to use commonsense.'

[7] On the same theme Holmes JA expressed himself as follows in *S v Malinga*:[3]

'The Court *a quo* treated Mabaso as an accomplice and an informer. He was certainly an informer. Whether in the circumstances he was *de jure* an accomplice I need not decide, for the trial Court's view that he was could only redound to the benefit of the accused. Whatever the juristic niche into which he may be classified as a witness, his evidence had two things in common with that of an accomplice. First, he had a possible motive to benefit himself by false implication of others, for he was an escaped indeterminate convict who had agreed to help the police to round up his confederates in crime. Second, by reason of his participation in this crime he was in a position in Court to deceive the unwary by a realistic account of it, his only fiction being the deceptive substitution of the accused for the real culprits, or the addition of one or more participants for good measure. Hence the prudence of applying to his testimony the cautionary rule enunciated in *R. v. Ncanana*, 1948 (4) S.A. (A.D.) at pp. 405/6 and *R. v. Gumede*, 1949 (3) S.A. 749 (A.D.).'

I am in agreement with the principles set out above.

[8] In the court *a quo* Motala J, with Zondi J concurring, correctly found that the magistrate had misdirected himself and that the court was accordingly at large to reassess the evidence and determine for itself whether on the evidence the guilt of the appellant had been proved beyond reasonable doubt.

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[3] 1963 (1) SA 692 (A) 693H–694A.

[9] There are two further instances of misdirection alluded to by the court *a quo*. Firstly the magistrate described the cause of death as being several stab wounds in the deceased's chest area ('verskeie steekwonde in die borskasarea') whereas the post mortem report records that the stab wounds found on the deceased's body were concentrated in the neck area and did not cause her death. There it is recorded that the deceased died of chest injuries – an obvious reference to the multiple fracture of the ribs. Secondly, the magistrate noted that the appellant's DNA profile could be read into the results of the analysis of two cigarette stubs found at the scene whereas the generic material found on one of the butts was definitely not from the appellant and no generic material could be retrieved from the other butt.

The Evidence

[10] Daniels told the court that he and the appellant were good friends. On the day of the incident he was fetched by the appellant and the appellant's cousin, Mr Ashley Stephanus in a 'bakkie'. They went to a shebeen in 16th Avenue Ravensmead where they drank liquor until they had no money left. The appellant suggested that they go to the business premises of appellant's father to make certain telephone calls to ask for money for more beer. The three of them and two others went there. Upon their arrival Daniels remained seated on the bakkie. The appellant jumped over a fence which surrounded the premises and went to fetch the keys to a gate and to the office in the building. All five of them entered the building, but at some stage the other three went out again. Daniels telephoned his mother and the appellant, his father. Daniels then went out and joined the others on the bakkie. He then saw the appellant coming out carrying a telefax machine. Daniels and the others objected to what the appellant was doing. Daniels and appellant then returned to the building

leaving the telefax machine on the bakkie. Ashley, however, took it from the bakkie and passed it over to Wayne who was already on the other side of the fence to receive it.

[11] As the fax machine was being passed over the deceased appeared and enquired what it was that was being passed over. She then threatened to report to appellant's father that he was bringing unknown persons to the premises. She said she had seen the telefax machine being passed over the fence and said she was going to report the matter to the appellant's elder brother, William. The appellant and Daniels pleaded with her not to report the incident. She agreed on condition that they re-plugged the telefax machine in its place. Daniels did so. The deceased then noticed that a drill stand had been moved from its usual location. She now resolved to report what was happening to William as things had then got out of hand.

[12] While she was busy sweeping the floor Daniels says he saw the appellant grabbing the deceased by her arm and stabbing her. The appellant shouted at him to also stab the deceased but Daniels ran out and went to sit outside on a box. By then their three companions had driven away in the bakkie. The appellant remained inside for some time while Daniels was seated outside. Marshall arrived and asked where the deceased was but Daniels said he did not know. Marshall then went to the building where the appellant told him that the deceased had gone to the shops. A short while thereafter the appellant came out of the building and he and Daniels then ran away. On the way, appellant told Daniels that he had stabbed the deceased and did not have long to live. He showed Daniels certain marks on his arm and claimed he had been scratched by

the deceased. Daniels noticed that the appellant's trousers were blood-stained.

[13] About a week later, the appellant told him that he had exchanged his trousers with his cousin. He had with him a bag containing a blood-soaked sweater which he later burnt in the presence of Daniels.

[14] Testifying in his defence the appellant told the court that he had earlier that morning been drinking at Ashley's home and not at the shebeen in 16th Avenue as alleged by Daniels. His version on this point was confirmed by Ashley. The appellant agreed with Daniels that he and the others went to his father's business premises to use the telephone. He said Daniels phoned a few girl friends and he had phoned his father who declined to provide any money. According to him it was Daniels who suggested that power tools on the premises be taken to be pawned. The appellant considered the drill stand to be too bulky and did not think that it would be a good idea to remove it.

[15] Daniels then disconnected the telefax machine. Although he did not think that it was a good idea he nevertheless agreed to go along with the idea that it being removed and sold so that they could get money to buy beer. The appellant confirmed Daniels's version that the telefax machine was returned after the deceased scolded them and threatened to report the incident to the appellant's brother, William. He also confirmed that she agreed not to report the incident after the fax machine was returned. He also agreed with Daniels that when the deceased noticed that the drill stand had been removed from its place she resolved to report the incident to the appellant's father.

[16] It was then that Daniels told the appellant that he was going to stab the deceased. The appellant thought that Daniels was joking. Daniels then passed a pair of scissors to him, and armed himself with a broken spear. Daniels later returned the pair of scissors. The appellant then heard a sound, like a head hitting the ground and the sound of someone struggling to speak. He went outside and saw Daniels sitting on top of the deceased. He pulled Daniels off. Daniels then said *"ek [i.e. appellant] moet iets vir die bloed kry"*. The appellant then removed his t-shirt and threw it to Daniels who wiped his hands with it. He took his t-shirt back and felt the deceased's neck to see if she was still alive. He then went to the bathroom and washed his hands. He threw water on his bloody footprints. He hid his t-shirt in a disused toilet. He and Daniels then ran away. Along the way, Daniels handed him a pair of scissors which he threw away. A month or two later, he retrieved his t-shirt and he and Daniels burnt it.'

[17] The trial court was confronted with these two conflicting versions. There is very little to choose between them. Neither was an impressive witness. Both lied about the crucial aspects of the incident and both had equal motive to kill the deceased and to distance themselves from the incident.

Discussion

[18] The onus was on the State to prove the guilt of the appellant beyond reasonable doubt. As already indicated it relied on Daniels who was a single witness and whose evidence had to be treated with caution. The court *a quo* found that he lied about the reason for going to the premises. It also found that there were discrepancies between what he said in court and his statement to the police. Daniels had intimate knowledge of what had happened at the scene of crime and he, like the

appellant, was in danger of being reported to the appellant's father. He lied to Marshall as to the deceased's whereabouts. Daniels admitted that at one stage he had a broken spear in his hand. He claimed that he had it when he was outside. There is to my mind more than a reasonable possibility of his involvement in the murder. Before the deceased was killed on his own admission he was carrying a broken spear; he can't explain why. He lied to the deceased's husband, Marshall, when the latter asked where his wife was. He fled from the scene together with the appellant and offers no explanation for it.

[19] It seems to me that the court *a quo* unwittingly fell into the same trap as the trial court of expressing a preference for a version that could not bear scrutiny. Having come to the conclusion that the evidence of Daniels had to be treated with a high degree of caution, the court *a quo* went on to look for factors which it considered would lessen the risk of relying on the evidence of Daniels. The factors the court found were the appellant's evidence relating to the t-shirt: the fact that he handed it over to Daniels to wipe his hands, that it was blood-soaked, that he had wiped off his footprints with it, that he hid the t-shirt and subsequently burned it in the presence of Daniels, that before leaving the scene the appellant had thrown water on his bloody footprints. All of the above factors were considered to be irreconcilable with the appellant's innocence.

[20] A further factor which the court *a quo* considered as providing some guarantee that Daniels was telling the truth was confirmation by Marshall that when he returned, Daniels was sitting outside while the appellant remained inside the building.

[21] The court concluded that on all of the above factors, especially the fact that the appellant's t-shirt was soaked in blood, is that the appellant was involved in the assault on the deceased, either alone or together with Daniels. It dismissed appellant's version that he had handed the t-shirt to Daniels to wipe his hands with it as 'absurd'. As contended by counsel for the appellant this piece of evidence might be suspicious but to dismiss it as absurd is taking the matter too far. The confirmation by Marshall that Daniels was sitting outside at some stage does not take the matter any further. In any event it is an aspect that is common cause. It will be recalled that it was the appellant's case that after the assault there was a stage when Daniels went out. It is in any event conceivable that there would have been blood on the appellant's t-shirt if, as he says, he at some stage had to pull Daniels off the deceased.

[22] The main focus of the court *a quo* was the evidence of Daniels and the appellant.

[23] The finding of the court that Daniels was possibly involved must of necessity imply a finding that his denial in the witness box of any involvement was a blatant lie. Although the appellant appears from the record not to have been a particularly impressive witness, he was not shown to be a liar and his shortcomings do not in any way supplement the deficiencies in the State case.

[24] It was conceded on the appellant's behalf that on his own version he had made himself guilty of being an accessory after the fact. That is clear from the evidence relating to the burning of his t-shirt, the wiping of the blood and that he lied to Marshall as to the whereabouts of the deceased. In my view the concession was properly made. On all the

evidence the appellant should have been convicted of being an accessory after the fact to murder.

Sentence

[25] I do not think that any purpose would be served by referring the matter to the trial court for sentence. All the facts relevant to sentence are before us. There is in addition a report of the probation officer who recommended that in the circumstances of this case correctional supervision in terms in terms of section 276(1)(h) of the Act would be a more appropriate sentence. Counsel for the appellant supported this recommendation. Counsel for the State also conceded that if we were minded to substitute a conviction of being accessory after the fact to murder, the sentence of correctional supervision proposed by the probation officer would be appropriate.

[26] At the time of the incident the appellant was a school going lad aged 16 years old and 20 years when sentence was handed down on 13 March 2006. At present he is 22 years old and his circumstances have now changed. We were informed from the bar by his counsel that he currently assists his father in his building contracting business. The appellant is a first offender. As can be gleaned from the history of this matter the case has been hanging over his head for some time.

[27] Although the appellant has been convicted of a lesser offence of being an accessory after the fact to murder it is still a very serious matter. The actions of the appellant were aimed at assisting the perpetrator to avoid the consequences of his actions. But for his youth a term of imprisonment would have been an appropriate sentence. There is no doubt however that the case is deserving of stringent corrective measures

to bring home to the appellant seriousness of the offence he committed. It also appears that liquour played a role in the incident. They came to his father's business premises in an attempt to get money to buy more beer. The conditions applicable to a sentence of correctional supervision can be tailored to take this into account.

Wasted Costs

[28] Before deciding on the appropriate order there is one further matter I wish to deal with. This appeal was originally enrolled for hearing on 15 May 2008. There was no appearance for the State and we were totally in the dark as to what had happened. It was the industrious effort of counsel for the appellant, Mr Maartens, to whom this court is indebted, who telephoned the office of the Director of Public Prosecutions in Cape Town and established that that office was unaware that the matter was set down for that date. This, despite the fact that the Notice of Set Down of the appeal was forwarded by the Registrar of this court to that office by registered post, and was signed for at the DPP's office. The appeal was then postponed to 27 May 2008 with an order directing the Registrar to seek an explanation from the DPP's office for the non-appearance of the representative of the State at the appeal hearing. Some few days before the postponed hearing a letter explaining how the debacle occurred and tendering the necessary apology to the court was received. It also contained an undertaking that certain measures have been put in place and an assurance that a recurrence would be avoided. At the postponed hearing the State was represented by Ms Raphels who offered the State's apology to the members of the court and repeated the explanation and assurances given in the letter addressed to the court by the DPP. We accept the apology.

[29] It must be stressed however that the appellant was put to considerable expense as a result of the negligence of the State in failing to ensure that it was represented at the hearing. Quite rightly counsel for the appellant asked for an order directing the State to pay the wasted costs occasioned by the non-continuation of the matter on 15 May 2008. Counsel for the State could not oppose the application. I agree with counsel for the appellant that this is a proper case for a suitable order for costs against the State to compensate the appellant for the wasted costs incurred as a result of the State's non-appearance on 15 May 2008. Such cost should in my view be taxed on the scale as between attorney and client to minimise the prejudice to the appellant.

Order

[30] In the particular circumstances of this case I consider that an appropriate sentence would be one of correctional supervision. In the result the appeal is allowed to the extent set out below. I shall set out the conditions of the correctional supervision order in Afrikaans, as that is the appellant's home language. The order of the court *a quo* is set aside and replaced with the following:

'1. The appeal is allowed.

2. The conviction of murder and the sentence imposed are set aside, and the following substituted:

"Die beskuldigde word skuldig bevind aan begunstiging tot moord en gevonnis tot twee jaar korrektiewe toesig in terme van artikel 276(1)(h) van die Strafproseswet 51 van 1977 op die volgende voorwaardes:

1(a) Huisarres te Rangeweg 8, Matroosfontein, Elsiesrivier, Wes-Kaap gedurende die tye soos deur die Kommissaris van Korrektiewe Dienste bepaal vir die volle duur van korrektiewe toesig. Met dien verstande dat die Kommissaris gemagtig word om die plek te

wysig en enige tydperk van huisarres op te skort of te verleng onder die voorwaardes wat hy goedvind of, daarna, vir solank en onder sodanige voorwaardes as wat hy mag goedvind, her in te stel.

(b) Gemeenskapsdiens vir ‘n maksimum periode van 16 uur per maand vir die duur van die vonnis.

Die diens sal bestaan uit skoonmaak en instandhouding van perseel te SAPD Kuilsrivier onder toesig van die stasie kommissaris of sy gevolgmagtige.

Met dien verstande dat die Kommissaris gemagtig word om:

Die aard van die diens en die plek waar dit gelewer word, te wysig indien dit nodig is om die nakoming van die vonnis te bevorder.

Indien verdienstelik, hoogstens een derde van die tyd waarin Gemeenskapsdiens verrig moet word, op te skort onder voorwaardes wat hy goed vind.

Addisionele gemeenskapsdiens by te voeg ten einde nakoming van die vonnis te bevorder, maar wat nie die oorspronklike hoeveelheid ure oorskry nie.

(c) Onderwerping aan behandelingsprogram(me)/rehabilitasieprogram soos bepaal met re-assessering deur maatskaplike werker by Gemkor kantoor.

(d) Die plek waar, tye waartydens, duur en inhoud van sodanige programme/toesigdiens sal deur die Kommissaris van Korrektiewe Dienste bepaal word. Enige koste verbonde aan sodanige programme/toesigdiens kan van die beskuldigde verhaal word.

(e) Onderwerping aan monitering deur die Kommissaris van Korrektiewe Dienste ten einde die oogmerke van hierdie vonnis te verwesenlik.

2. Die beskuldigde mag nie sonder toestemming van die Korrektiewe Beampte die landdrosdistrik waar hy woon en werk verlaat nie.

3. Die beskuldigde moet:

(a) By die korrektiewe beampte aanmeld by Landdroshof Bellville, kamer 311 binne 14 dae na afloop van verrigtinge in die hof.

(b) Hom vir die volle duur van hierdie vonnis van die gebruik van sterk drank of die gebruik van dwelmmiddels anders as op voorskrif van'n mediese praktisyn weerhou.

(c) Enige redelike opdragte betreffende die nakoming en administrasie van hierdie vonnis wat die Kommissaris van Korrektiewe Dienste uitreik, uitvoer.

(d) Die Kommissaris van Korrektiewe Dienste vooraf in kennis stel van enige verandering van woon- of werksadres.

(e) Hom ook skuldig maak aan enige verdere misdaad nie."'

3. The State is ordered to pay to the appellant the wasted costs occasioned by the non-appearance of its representative on 15 May 2008. Such costs are to be taxed by the taxing master of the Cape High Court according to the attorney and client scale in civil cases applicable in that court, and are to be paid within 30 days of the taxing master placing his *allocatur* on the bill of costs.[4]

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

CLOETE JA
MHLANTLA AJA

[4] Cf ss 310A(6) and 311(2) of the Criminal Procedure Act 51 of 1977.