THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 408/04
REPORTABLE

In the matter between:

Kagiso Howard MALEKA Appellant

and

The STATE Respondent

Before: Cameron, Conradie and Heher JJA
Appeal: Tuesday 17 May 2005
Judgment: Friday 20 May 2005

Criminal law – Evidence – Admissions – Question raised whether admission may be taken to have been impliedly made

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JUDGMENT

CAMERON JA:

[1] The appellant was convicted in the Bafokeng regional court at Tlhabane of murdering Zwelinzima Ivan Mtshatsheni. The

regional magistrate, Mr Motsomane, applying the minimum sentencing legislation, [1] sentenced him to 15 years' imprisonment. On appeal the high court at Mmabatho set aside the murder conviction and substituted a conviction of culpable homicide (plus six years' imprisonment). Hendler J (Landman AJ concurring) refused leave to appeal against this outcome, but this court later granted the necessary leave.

[2] The main point taken before this court is that the state failed to prove that the appellant caused the injuries the deceased sustained. In conjunction with this, the appellant contends that the state failed to negative his defence that he acted lawfully in killing the deceased, since it failed to prove that he exceeded the bounds of self-defence. To appreciate these submissions an account of the facts and the conduct of the trial is necessary.

[3] The charge arose from an incident on 5 October 2001 at Meriting (a Rustenburg township) near the home of the deceased's friend, Ms Lovely Sebotse. It was common cause that an altercation occurred when his wife arrived at Ms Sebotse's home, where the deceased was over-nighting. (The

[1] Criminal Law Amendment Act 105 of 1997 s 51.

appellant had driven the deceased's wife to the scene in his van but was prudently keeping a low profile down the block.) When the deceased's wife left, the deceased set out after her. Sebotse and her friend Ms Hellen Isabella Molwana followed. Finding the appellant's motor van in the street nearby, the three waited until the appellant arrived. Some words were exchanged, but at this critical point Sebotse and Molwana felt impelled to return home to secure the children in the unlocked house.

[4] Sebotse and Molwana, the sole witnesses for the state, related that on returning to the scene they heard 'a big sound', and observed the deceased retreating backwards. He lifted his hands and fell, after which the appellant bent over him. Neither saw what occurred between the two. Neither saw the appellant assault the deceased.

[5] The appellant was legally represented during his trial. He pleaded not guilty, offering no explanation in expansion of his plea. At the close of the state case the magistrate refused an application for his discharge. He then took the witness stand. The deceased, he said, followed him after the women left, pelting him with stones. He ran away but tripped and fell in an

empty adjacent plot. He then threw a stone at the deceased – 'a very small stone', barely half the size of his hand. He did so, he said, 'in spread of desperation because [the deceased] was chasing me hell and back, and after I threw, I guess there I got desperate and threw the stone at him because he was closing [the] gap'.

[6] None of the deceased's stones hit him. After throwing his stone, he said, he looked back and realised the deceased was no longer following him. He went back to the road and found the deceased lying on the ground. He was 'like groaning and all those things'. He admitted his stone must have struck the deceased. The deceased at this stage 'looked lameness and I thought he must have been badly injured'. He tried to lift him up, he claimed, to take him for medical attention. (Molwana stated that she 'saw accused lifting deceased's legs and pulling him towards the bakkie', but that he left when bystanders converged.) He could not tell whether the deceased was still alive at that stage.

[7] The deceased had in fact been severely injured. He appears to have died at the scene. The post-mortem examination was eight days later. It found that the cause of death was 'head

and abdominal injuries due to blunt trauma'. The injuries recorded were extensive: an abrasive bruise of the right forehead; abrasions of the left forehead, right and left elbows and right knee; bruise of the right thigh; peri-orbital haematoma with conjunctival haemorrhage [black eye] on the left side. In addition, the post-mortem found deep scalp bruising, skull fractures including the base of the skull, acute subdural haemorrhage, frontal lobe contusions, brain swelling and herniations, with evidence of raised intra-cranial pressure. The skull fracture was described in more detail: 'A linear fissured fracture of the occipital bone in the midline 75mm long, and a comminuted [splintered] fracture of the base of skull.' There was acute bilateral subdural haemorrhage. The spleen had been lacerated, and blood had been aspirated.

[8] The magistrate taxed the appellant at the end of his evidence with these injuries. He was unable to account for them. Instead, he offered the lame suggestion that 'the place in which [the deceased] fell was full of stones'. At this the magistrate inquired: 'So in other words you suggest that these injuries might have been caused by his falling?'. The appellant replied: 'They might have been aggravated by his falling.' (In argument

at the end of the trial, his attorney urged that some of the injuries could also have been caused when the appellant, as observed by Molwana, tried to drag the deceased to his bakkie.)

[9] The significance of this interchange is that the appellant at no stage suggested that anyone other than he had been or could have been responsible for the deceased's injuries. His entire account of the incident with the deceased involved only two persons: himself and the deceased. There was no suggestion of a further intervening party or of any supervening cause.

[10] It is against this background that the main point now taken on the appellant's behalf must be considered. At the outset of the trial, the appellant admitted the 'results' of the post-mortem. His attorney emphasised that he admitted 'the correctness of the post-mortem itself'. At that stage, the appellant's version of self-defence had not yet been disclosed. But it was clear that the manner of the deceased's death, the cause of death, and the nature of the injuries he had suffered, were not in issue.

[11] The point the appellant now takes arises from the fact that at the outset of a prosecution involving an unlawful killing the admissions made usually include the identity of the deceased;

the accuracy of the post-mortem report; and, in addition, *that the deceased's body suffered no further injuries between his death and the performance upon it of the post-mortem*. These admissions are almost invariably made together. Otherwise the doctor who performed the post-mortem (if not already scheduled to testify) can be called to clarify matters or to resolve any dispute.

[12] In this case, the admission concerning absence of further injuries was not made. This appears to have been an oversight, due to inexperience or inadvertence on the part equally of magistrate, defending attorney and prosecuting counsel. At no stage during the trial was it suggested that the deceased's body had in fact later suffered further injuries.

[13] The point is clearly an after-thought, arising from the gap opened by the omission of the usual admission; and is in this sense opportunistic. If however it reveals a hole beneath the water-line of the state's case, the conviction of unlawful killing cannot stand; and the point must for this reason be carefully considered.

[14] Counsel for the appellant emphasised that no evidence was tendered as to what became of the deceased after he fell

down, when and how he was removed from the scene, where his body was kept until the post-mortem, or to show that the body suffered no further injuries between the incident with the appellant and the post-mortem. He therefore contended that in the absence of medical evidence on these aspects no satisfactory finding could be made as to how the deceased suffered his injuries.

[15] Counsel's premise is correct, but the conclusion he seeks to extract is mistaken. It is true that medical evidence was lacking. And it would undoubtedly have been preferable to call the doctor who performed the post-mortem to testify. But a criminal trial, famously, is not a game. The sole question in dispute at the appellant's trial was whether he intended to kill the deceased. The concluding addresses of the prosecutor and the appellant's attorney, which (mistakenly) were transcribed and included in the appeal record, reveal that this was the only point argued. And it was solely in relation to the question of intention that the way in which the deceased sustained his injuries was debated.

[16] Had the point now taken been raised at the trial, the magistrate may well have been duty-bound in the interests of

justice to call the doctor who performed the post-mortem and those responsible for ensuring the integrity of the corpse between the scene of the incident and the mortuary (*R v Hepworth* 1928 AD 265 277). The taking of such a point after the trial may in appropriate circumstances raise the question whether an admission such as that at issue now – concerning the integrity of the body between death and post-mortem – may not be taken to have been made impliedly.[2]

[17] It is not however necessary to canvass this question now. This is because the evidence the state presented, together with the admissions the appellant expressly made, established beyond reasonable doubt that the injuries in question were inflicted at the scene and not later. There are two steps to this conclusion.

[18] First, the appellant, as pointed out earlier, admitted the 'contents' and 'results' of the post-mortem report. That report found that the cause of death was 'head and abdominal injuries due to blunt trauma'. This can only mean that the injuries listed in the report were those that caused the death. They could

[2] Compare *S v Mathlare* 2000 (2) SA 515 (SCA) para 9, where cross-examination was held to have yielded a 'clear implied informal admission' of a fact crucial to the state's case; and see also *S v Boesak* 2000 (3) SA 381, 2000 (1) SACR 633 paras 50-55; *S v Boesak* 2001 (1) SA 912 (CC) paras 26-29.

thus not have been inflicted afterwards. The appellant's admission therefore necessarily entails that the injuries were inflicted before his death.

[19] Second, the evidence established that the deceased died at the scene. Counsel for the appellant sought to suggest that the deceased may not have died there, and thus that the fatal injuries may have been inflicted later. But this is at odds with the uncontested evidence. Sebotse confirmed in her evidence in chief that the deceased died at the scene. It is true, as counsel pointed out, that she also stated that she 'had no courage to look at the deceased'. But this was in answer to a question whether she noticed injuries on his person. There is a great difference between being able confirm from first-hand knowledge that someone has died, and being willing to examine the corpse to establish the extent of the corporeal damage. Sebotse did the former. She was unwilling to do the latter. Her statement that the deceased had died at the scene was unchallenged in cross-examination, and must be taken to have been established.

[20] It follows that the state proved beyond reasonable doubt that the injuries the deceased suffered, and which resulted in his death, were inflicted at the scene.

[21] It also follows from what has been set out above that it was proved beyond reasonable doubt that it was the appellant, and the appellant alone, who inflicted those injuries. His counsel accepted in arguing the appeal that, if his main point found no favour, it would not be possible to maintain that there was doubt about the unreasonable excess of force involved in the killing.

[22] And indeed this is so. The injuries the deceased suffered were manifold, various and terrible. It is quite clear that the appellant's version as to their infliction was spurious, and that the only reasonable inference, consistent with all the proven facts, is that something occurred at the scene, after the departure of Sebotse and Molwana, that led him to a fatal attack on the deceased. This while he escaped quite untouched. The possibility that this could have occurred within the norms of reasonable conduct, or that the appellant thought or could reasonably have apprehended that his conduct was lawful, is so remote that it may safely be excluded. Indeed, the

inference that the injuries may have been intentionally inflicted looms so large that the appellant may consider himself lucky to have escaped the murder conviction.

[23] There is little to say about sentence, and counsel did not attempt to say more.

[24] The appeal against both conviction and sentence is dismissed.

E CAMERON
JUDGE OF APPEAL

CONCUR:
CONRADIE JA
HEHER JA