



THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA

## JUDGMENT

**Case No: 271/2008**

**No precedential significance**

**MARK ANTHONY MORGAN**

**Appellant**

**and**

**THE STATE**

**Respondent**

**Neutral citation:** *Morgan v The State* (271/2008)[2008] ZASCA 147  
(27 November 2008)

**Coram:** Mthiyane, Heher and Ponnann JJA

**Heard:** 5 November 2008

**Delivered:** 27 November 2008

**Summary:** Appellant implicated by two members of a gang in a shooting and killing of a fellow gang member – appellant perceived as member of a rival gang - evidence to be treated with caution to eliminate the risk of false incrimination. Alleged conspiracy between witnesses to falsely implicate appellant found not to exist – their evidence considered in its totality found to be acceptable despite contradictions.

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**ORDER**

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**On appeal from:** High Court, Witwatersrand Local Division (Full Court per Bham AJ, Blieden and Makhanya JJ)

1 The appeal is dismissed.

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**JUDGMENT**

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MTHIYANE JA (HEHER and PONNAN JJA concurring):

[1] The appellant stood trial in the Johannesburg High Court (Satchwell J) with a co-accused, Kenneth Morgan (accused 1) on charges which included murder, attempted murder, unlawful possession of a firearm and unlawful possession of ammunition in contravention of ss 2 and 36 of the Arms and Ammunition Act 75 of 1969 respectively. The charges arose out of an incident in Westbury on 30 November 2003 in which Adrian Barris ('the deceased') was shot and killed. At the time of the incident shots were also fired at the deceased's friend, Godfrey Leghlo – hence the charge to attempted murder.

[2] The appellant was convicted and sentenced to 15 years' imprisonment for the murder and six years' imprisonment for the attempted murder, the latter to run concurrently with the 15 year sentence. In addition, the appellant was sentenced to three years' imprisonment for the unlawful possession of a firearm and six months' imprisonment for the unlawful possession of ammunition, the latter to run concurrently with the three year sentence imposed for the unlawful possession of a firearm. It was further ordered that half of the sentences

imposed in respect of the unlawful possession of a firearm and ammunition were to run concurrently with the sentence of 15 years' imprisonment imposed for the murder. The appellant was thus sentenced to an effective term of imprisonment of 16 years and six months.

[3] The state alleged that the deceased was shot and killed by the appellant. The appellant denied the allegations and raised an alibi defence and tendered a plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 to that effect. He also denied that he shot at Godfrey Leghlo or that he was in possession of a firearm and ammunition.

[4] The trial judge rejected the appellant's alibi defence and accepted the evidence of the three state witnesses, Leghlo, Iva Kiranie and Aubrey Baardman, who placed appellant on the scene and implicated him in the offences of which he was subsequently convicted.

[5] With the trial court's leave the appellant and his co-accused appealed to the Full Bench of the Witwatersrand Local Division against both their convictions and sentences. Accused 1's appeal succeeded but the appellant failed in his appeal against the conviction. The appellant succeeded only in having his sentence reduced to an effective term of imprisonment of 15 years.

[6] On appeal the Full Bench (Bham AJ with Blieden and Makhanya JJ concurring) found Satchwell J to have been correct in accepting the evidence of the three witnesses especially on the crucial issue of whether or not the appellant was present at the scene at the time of the shooting. The Full Bench also found that on the evidence taken as a whole the state

had proved its case against the appellant beyond reasonable doubt.

[7] The appellant was granted special leave by this court to appeal against the conviction. Before considering the correctness of the conviction it bears mention that in its assessment of the evidence the trial judge made no credibility findings and thus we are not precluded on appeal from making our own assessment of the evidence, with due regard to the probabilities.

[8] Leghlo testified that on the day of the incident he and the deceased were returning from a 'function'. As they were walking along Du Plessis Street towards Gavin Flats they observed Gato, who was standing outside the building drinking beer. At that point Leghlo saw a white BMW motor vehicle belonging to accused 1 which had pulled up in Du Plessis Street. Accused 1 was behind the wheel while the appellant and Ricardo were standing next to the vehicle at the driver's door. He then saw the appellant and Ricardo receiving two firearms from accused 1. Ricardo and the appellant tucked the firearms underneath their shirts and walked away from the vehicle towards Gavin Flats. Accused 1 drove away.

[9] Leghlo heard people screaming. He saw Baardman and Gato fighting. As Leghlo and the deceased were on their way to where the fight was taking place Leghlo heard what sounded like a firearm being cocked. When he turned to look he saw the appellant about four metres behind them pointing a firearm at him and the deceased. Leghlo touched the deceased alerting him to the danger, shouted and then jumped clear, as a result of which he fell. While he was on the ground Leghlo heard a shot being fired and saw the deceased falling. Before falling the deceased had had his firearm in his hand. Leghlo snatched it from him and started firing

back. After a brief exchange of gunshots the appellant and Ricardo fled from the scene. Leghlo then handed the firearm to Baardman.

[10] Kiranie told the court that she and her daughter were on their way to the shop when she saw Leghlo and the deceased walking along Du Plessis Street. She then heard gunshots and saw appellant shooting at Leghlo and the deceased. She saw the deceased falling down and Leghlo take the firearm from him and fire at the appellant. The appellant ran away.

[11] Baardman testified that on the day of the incident he and Pulen attended the same function as Leghlo and the deceased. When the deceased and Leghlo left he and Pulen followed out of curiosity. He saw accused 1 in his white BMW motor vehicle in Du Plessis Street and the appellant and Ricardo standing next to it. When the two of them walked from the vehicle towards Gavin Flats, they had their shirts pulled over their trousers but he did not see any firearms in their possession.

[12] Baardman saw Gato standing alone near Gavin Flats, drinking beer from a bottle. Gato approached Baardman and started swearing at him and, for no apparent reason started to assault him. A fight broke out between them. While they were fighting Baardman saw the deceased and Leghlo approaching. However, before they arrived, Baardman heard a gunshot go off and saw the deceased falling. On turning he saw the appellant shooting at Leghlo. He saw Leghlo fall and take a firearm from the deceased and fire shots at the appellant who turned and ran away while continuing to fire at Leghlo. After the shooting Baardman went to where the deceased had fallen. Leghlo handed him the firearm.

[13] The appellant testified in his own defence. He also relied on the evidence of accused 1. It is convenient to refer first to the latter's evidence. He told the court that on the day of the incident he attended a soccer match at Westbury. After the match he took Gato, Ricardo and Josie to Du Plessis Street in his BMW motor vehicle. He denied seeing the appellant at all. He recalled seeing Leghlo in the parking area adjoining Du Plessis Street before driving away.

[14] The appellant testified that he also attended the soccer match at Newlands Stadium. He did not see accused 1 – he had travelled to and from the match on foot. Afterwards the match he escorted his girlfriend to her home in Du Plessis Street. He thereafter went home where he spent the rest of the evening with a neighbour.

[15] The appellant also relied on the evidence of two defence witnesses, Ms Shereen Snell and Ms Ricordia Arends. These witnesses do not however take the matter any further. Snell testified that while she was with Gato, Leghlo, Baardman and another person approached them and started assaulting Gato for no reason. She fled. After she reached home she heard the sound of gunfire, and looking out of her window, saw Baardman and Leghlo arguing over two firearms. She had seen Leghlo shooting at Gato as the latter ran away but did not see the deceased being shot or Leghlo being shot at. She could thus not say who was responsible for these shootings, or whether the appellant was present at the time.

[16] Similarly Arends was of no assistance. Her evidence related to an incident involving the deceased which had nothing to do with the offences of which the appellant was convicted.

[17] In the appeal before us it was submitted that in his defence the appellant could take the matter no further than to assert that he was not at the scene at the time of the shooting. The appellant's counsel was critical of the evidence of Leghlo, Baardman and Kiranie which he dismissed as unreliable and riddled with contradictions. The evidence, submitted counsel, should not have been accepted by Satchwell J. In addition, counsel cautioned that the evidence had to be approached with caution as the witnesses Leghlo and Baardman were members of a rival gang, the Majimbo's and the risk of false incrimination was very real. There is a lot to be said for this submission as the witnesses Leghlo and Baardman were indeed avowed members of the rival gang. Although the appellant denied that he was a member of the other gang, the Fast Guns, he was perceived by the witnesses as a member of this gang. Accused 1 was alleged by the witnesses, to be the leader of the Fast Guns. Accused 1 admitted membership of the gang but denied that he was its leader.

[18] It is convenient to deal first with the submissions relating to the contradictions. There is no doubt that the witnesses Leghlo, Baardman and Kiranie contradicted themselves in certain respects. Both the trial court and the court a quo were alive to this aspect in their assessment of the evidence. Bham AJ in dealing with the contradictions in their evidence said the following in a passage which I adopt:

'Whilst it is important to consider, in determining whether the state has proved its case beyond reasonable doubt, the component parts of the evidence tendered on behalf of the state, one should be careful not to sink into the detail of such component parts in a manner which obviates the totality of the picture.'

It is however clear that, despite the contradictions, their testimony on the crucial question of whether the appellant was at the scene and whether he shot at and killed the deceased was unshaken. While Leghlo came across

as garrulous especially during cross examination it cannot be said that he was an untruthful witness. The criticism of Kiranie as a witness is not without substance. She was not an impressive witness and no doubt, her evidence has value only in so far as it is reliably confirmed. In the last mentioned regard it is important to evaluate that evidence which placed the appellant at the scene.

[19] Did gang rivalry play any role in the implication of the appellant in the offences of which he was convicted? The potential for deceit, particularly in the case of Leghlo and Baardman, who were admittedly members of the Majimbos, cannot be ignored and consequently their evidence has to be approached with caution. In the case of the three witnesses Leghlo, Boardman and Kiranie some assurance that their evidence could be relied on is to be found in the fact that they corroborate each other on the crucial aspects of whether the appellant was at the scene and whether he shot and killed the deceased. Furthermore Kiranie was not a member of either of the rival gangs. She had no axe to grind with the appellant and no reason or motive to implicate the appellant falsely. In my view the admission by accused 1 that he arrived on the scene shortly before the shooting and dropped off Ricardo and two other persons in Du Plessis Street provides a measure of support for the evidence of Leghlo, Kiranie and Baardman. All of the above factors in my view serve to reduce the risk of false incrimination.

[20] This brings me to the question of the conspiracy theory advanced by counsel for the appellant. The real question on this point is whether the witnesses, Leghlo, Kiranie and Baardman deliberately substituted the appellant for the real killer in pursuance of a conspiracy falsely to implicate him. It was suggested by counsel that the three witnesses must



have come together at some point and conspired to implicate the appellant falsely.

[21] The conspiracy theory was not accepted by the trial court. On the probabilities it seems highly unlikely. If it occurred it would not have preceded the making of the statement to the police by Kiranie. She told the court that after the shooting (which occurred at about 18h00) she accompanied the deceased to hospital. She made a statement to the police in a police vehicle at the hospital later that evening at about 20h00, implicating the appellant in the shooting. There is no evidence that she met either Leghlo or Baardman at any stage before then. If the conspiracy theory is to be believed it would mean that Leghlo and Baardman would thereafter have had to tailor their version of events to fit in with the events as described by Kiranie in her statement. Even the contradictions in their evidence negate the suggestion. So far from supporting any theory of deliberate fabrication and thus a conspiracy between the eyewitnesses, the discrepancies in their evidence point rather to honest and independent observation and recollection.

[22] A persuasive aspect of the evidence of Leghlo was the fulsome and coherent detail of his testimony which nevertheless contained surprisingly little internal contradiction. It carries an overall ring of truth rather than conveying the impression of a story stitched together to serve an end. In short one is persuaded that he lived through the nail-biting events that he described and did not deliberately exaggerate or tailor his version.

[23] On a consideration of the evidence in its totality and in the light of the probabilities the case against the appellant was, in my view, proved beyond reasonable doubt. (See *S v Radebe* 1998 (1) SACR 422 (SCA) at

426F-H) When the evidence of the three witnesses is considered separately and individually there are undoubtedly some glaring weaknesses but when taken together there is no doubt as to the guilt of the appellant. A further factor which provides a measure of support for the above conclusion is that, once one accepts that the appellant was at the scene, the appellant's overall testimony is fundamentally undermined. The appellant was well known to the three witnesses. All three say they saw him at the scene. Leghlo saw that he had a gun. Kiranie also saw him firing shots from a gun. When all of these facts are taken together they allow if no other conclusion than that the case against the appellant was proved beyond reasonable doubt.

[24] Finally, as something of a throw away, counsel for the appellant submitted that the deceased might have been shot by Ricardo. In my view the suggestion is speculative and fanciful. It was never put to any of the state witnesses during cross-examination and no evidence was led to substantiate the point. In any event it is not incumbent upon the state to eliminate every conceivable possibility that may depend upon pure speculation. (See *S v Reddy* 1996 (2) SACR 1 (A).) The witnesses were in no doubt that it was the appellant who shot and killed the deceased.

[25] In the result the appeal is dismissed.

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**KK MTHIYANE**  
**JUDGE OF APPEAL**

Appearances:

For Appellant: E Classen

Instructed by:

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For Respondent: (Ms) J Steyn

Instructed by:

The Director of Public Prosecutions Johannesburg  
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