THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 461/13
Not Reportable

In the matter between:

SELWYN DAVIDS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Davids v The State* (461/13) [2014] ZASCA 74 (29 May 2014)
Coram:	Ponnan and Shongwe JJA, Hancke, Van Zyl and Mocumie AJJA
Heard:	21 May 2014
Delivered:	29 May 2014

Summary: Evidence ─ sufficiency of ─ State relied on the evidence of a co-accused implicating the appellant ─ both the co-accused and the appellant unsatisfactory witnesses ─ absence of corroboration and version contradicted in material respects by another witness applying the cautionary rule, State has not proved its case beyond a reasonable doubt.

ORDER

On appeal from: Western Cape High Court, Cape Town (Steyn and Goliath JJ sitting as court of appeal)

(1) The appeal succeeds.
(2) The order of the court below is set aside and in its stead is substituted the following;
'(a) The appeal is upheld;
(b) The convictions and sentences are set aside.'

JUDGMENT

Hancke AJA (Ponnan, Shongwe JJA, Van Zyl and Mocumie AJJA concurring):

[1] The appellant, being accused 3 in the Regional Court, was convicted on one charge each of murder and robbery with aggravating circumstances and sentenced to an effective term of imprisonment of 25 years. He appealed against his conviction to the Western Cape High Court. Although his appeal was unsuccessful, leave was granted to appeal to this court against his conviction.

[2] As will appear later in this judgment, the appellant's conviction was largely, if not exclusively, based on the evidence of his co-accused, accused 1. In his reasons for convicting him, the magistrate stated the following:

'As regards accused 3, his position is more or less the same as that of accused 2. He is also incriminated by accused 1 and it is further alleged by accused 1, evidence of which I do not have reason to doubt, that the motor vehicle was kept at Mr Davids' place in the garage where accused 2 happened to be residing . . . I do not have any reason to disbelieve accused 1's evidence that accused 3, Mr Davids was also involved in the robbery, he was present when the robbery took place. According to accused 1 he assisted accused 1 to push the car while accused 2 was inside as they approached the victims and I have looked at his defence. His defence is simply a bad denial and he cannot even tell where he was on that day, according to his evidence, he is not sure of his whereabouts on the night in question.

While he is unsure about his whereabouts accused 1 is certain about his whereabouts and he says he was present at Strandfontein and that he took part in the robbery and I cannot reject the version given by accused 1 in this respect as well and I have to accept that accused 3 was part of the three people who robbed the deceased. I do not have any reason to, or rather there is no acceptable reason advanced as to why the three, or the two of them were singled out by accused 1 and why accused 1 did not decide on incriminating strangers that he did not know, which would have been, you know, simple, I was forced by unknown people to go and rob, that would have been a different story, but in this case accused 2 and 3 wants the court to accept that a person that they have no problem with, a friend, has decided out of the blue to incriminate them and I find that there is sufficient grounds here to reject that view and there is sufficient grounds to accept the evidence of accused 1, who I believe has told the truth, except where he decides not to get involved himself, particularly in the main and obviously the most crucial murder and robbery, so I find, or rather find that the evidence is proved beyond reasonable doubt that **ACCUSED 3 WAS ALSO INVOLVED** . . . .'

[3] The evidence reveals that the deceased, the subject of the first charge, Mario Meyer, and some friends drove on the night of 30 March 2007 in his Toyota motor vehicle to a parking lot along Baden Powel Drive in the Muizenberg Beach area. After a while another vehicle drove into the same parking lot. Two men alighted from the vehicle and began pushing it in their direction. Then all of a sudden the latter two approached the deceased's vehicle. A scuffle ensued when they tried to grab the vehicle's keys from the deceased. The deceased and his friends were ordered out of the vehicle and robbed of their personal belongings. During the ensuing struggle between them the deceased was fatally stabbed. The two assailants got into the deceased's vehicle and drove off with it. No identification parade was ever held.

[4] The State called two eyewitnesses, Cherylene Philander and Rozena Pallas. Ms Pallas identified accused 1. Neither identified the appellant. As far as the number of attackers is concerned, the magistrate found that it was clear from the evidence that three persons were involved. According to him the witnesses:

'. . .were certain that all three people were involved.'

[5] This finding is not supported by the evidence. In her evidence Ms Philander only referred to two people being involved. According to her, the two persons were at

the scene and there was an argument between them and the deceased. One person asked for a screwdriver and she noticed another person outside the vehicle in which she was a passenger. She could not see the faces of those two persons due to the fact that it was dark.

[6] Ms Pallas initially also referred to two persons. Only in cross-examination did she refer to a third person who was 'in their own vehicle'.

[7] In this regard the magistrate clearly erred, because his finding is not consistent with the evidence. On the State's case it had thus not been established that three people were involved in the commission of the crimes.

[8] The magistrate also stated that the appellant's position was 'more or less the same as that of accused 2'. Apart from the evidence of accused 1, the State relied on reliable and direct circumstantial evidence implicating accused 2 in the commission of the crimes.

[9] Counsel for the State sought to place some reliance on a written statement made by accused 1 to a magistrate, in which he implicated accused 2 and the appellant. In this regard it is important to note what was stated by Navsa and Ponnan JJA in *Litako & others v S* [584/2013] ZASCA 54 (16 April 2014) para 67:

'It has been suggested by commentators that [the statutory hearsay provision] has sufficient safeguards to ensure the preservation of fair trial rights, more particularly, that [it] permits a court to admit hearsay evidence only if it "is of the opinion that such evidence should be admitted in the interests of justice". Considering the rationale at common law for excluding the use of extra-curial admissions by one accused against another, it appears to us that the interests of justice is best served by not invoking the Act for that purpose. Having regard to what is set out above, we are compelled to conclude that our system of criminal justice underpinned by constitutional values and principles which have, as their objective, a fair trial for accused persons, demands that we hold, [the statutory provision] notwithstanding, that the extra-curial *admission of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused*.' (My emphasis.)

[10] As far as accused 1's evidence is concerned, Counsel for the State conceded that accused 1 was an unreliable witness. Even the magistrate, justifiably stated on two occasions in his judgment that accused 1 was 'very economical with the truth' and that 'he didn't tell the whole truth'.

[11] It is common cause that accused 1 was an accomplice. Regarding the application of the cautionary rule, which finds application to his evidence, Holmes JA stated the following in *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440D-G:

'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description ─ his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up *a cautionary rule of practice* requiring *(a)* recognition by the trial Court of the foregoing dangers, and *(b)* the *safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused* in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him . . . Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.' (My emphasis.)

See also *S v Hlongwa* 1991 (1) SACR 583 (A) at 588.

[12] In view of the unreliability of the evidence of accused 1, the question is whether there is any *corroboration* for his version in relation to the involvement of the appellant. According to accused 1, the stolen Toyota motor vehicle of the deceased was taken to a garage on the appellant's property where it was stripped. However, the mechanic, Mr Cameron Fortuin, who accused 1 claimed was present at the appellant's home, testified that the said vehicle was brought to him. He also testified that accused 1 brought the vehicle to him due to the fact that there was something mechanically wrong with it. It was said that it had had 'a rough ride'. It therefore

appears that accused 1's evidence regarding the presence of the stolen vehicle in the appellant's garage is contradicted by Mr Fortuin, who was a State witness.

[13] It also appears that accused 2, who was correctly convicted on the two charges , moved into the appellant's house prior to the incident under consideration. The State relies on the fact that the phone of Ms Pallas was found in an outbuilding, described as a Wendy House, which was on the appellant's property. The Wendy House was however occupied by accused 2 and his wife.

[14] According to accused 1's version, the appellant was carrying a knife while accused 2 was armed with a firearm. His evidence in this regard is as follows:

'Selwyn (appellant) het gestoei met hom, *Selwyn het 'n mes op hom gehad* en Lionel (accused 2) het die vuurwapen in sy hand gehad en *dit is toe dat hulle die drywer gesteek het*.' (My emphasis.)

According to the medical evidence the death of the deceased was caused by a 'stab wound to the chest'. On the evidence of accused 1, the inference is therefore irresistible that it must have been the appellant who stabbed the deceased.

[15] However, in this regard the evidence of Mr Cameron Fortuin is important. He testified that accused 1 admitted to him that he stabbed the deceased. His evidence is as follows:

'Hy het langs my gesit. Toe ry ons om die blok, net wat ek stop toe is Allistair (accused 1) al uit, toe klim Allistair uit. Wat ek kyk waar om die kar af te *switch* en toe staan die polisie langs my. Maar voor dit het (onduidelik) Allistair waar kry jy die kar, toe *hy* het net *vir my gesê ek het die jong in die kar vrek gesteek* en wat ek die kar, wat ek kyk om die kar af te *switch* toe is die polisie langs my.' (My emphasis.)

It is therefore clear that the evidence of accused 1 is irreconcilable with the evidence of Fortuin in this regard. Moreover, one of the dangers of the uncritical receipt of an accomplice's evidence, namely the substitution of the appellant for the real perpetrator (in this instance himself if Fortuin is to be believed) looms large in this case.

[16] As far as the appellant's version is concerned, it is clear that he was similarly an unsatisfactory witness. In order to explain why he left his home, the appellant, for

example, testified that the day after this incident he went to Touwsrivier where he stayed for two months. It eventually turned out to have been eight months. The high court, evaluating his credibility, stated that the 'appellant's version is so ridiculous it borders on the preposterous'. But even if his version were to be rejected, as the magistrate appears to have done, that could hardly assist the State's case, given the inadequacy of its own witnesses.

[17] In convicting Accused 1 the magistrate appears to have rejected his version as being false in material respects. And yet the magistrate appears to have relied on the evidence of Accused 1 in convicting the appellant. That occurred in circumstances not only where there was an absence of corroboration for accused 1's version of the involvement of the appellant in the commission of the offences but also where his version is contradicted in material respects by the other evidence relied upon by the State. Apart from the fact that there may well be a strong suspicion against the appellant, the evidence does not establish his guilt beyond a reasonable doubt.

[18] Accordingly the appeal succeeds and the convictions and sentences are set aside.

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S P B HANCKE
ACTING JUDGE OF APPEAL

APPEARANCES:

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