THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number : 677/06
Reportable

In the matter between :

MARK SCOTT-CROSSLEY APPELLANT

and

THE STATE RESPONDENT

CORAM : MTHIYANE, CLOETE *et* PONNAN JJA

HEARD : 20 AUGUST 2007

DELIVERED : 28 SEPTEMBER 2007

Summary: Criminal appeals – reassessment of credibility of witnesses – corroboration – inference when version not put in cross-examination – accomplice evidence.

Neutral citation: This judgment may be referred to as *Scott-Crossley v S* [2007] SCA 127 (RSA).

THE COURT/

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[1] The appellant, Mr Mark Scott-Crossley, who was accused 3, and one of his employees, Mr Simon Johan Mathebula, accused 2, were convicted by Maluleke J and assessors in the High Court, Circuit Local Division for the Northern Circuit, sitting at Phalaborwa. The appellant was sentenced to life imprisonment, after the trial judge found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence.[1] In respect of accused 2 substantial and compelling circumstances were found to be present and he was sentenced to 15 years imprisonment, three of which were suspended on certain conditions. Accused 1, Mr Richard Doctor Mathebula, also employed by the appellant at the time, took ill during the trial and a separation of his trial was ordered at the State's request. The appeal, which is with the leave of this court, is against the appellant's conviction. There is no appeal by accused 2.

[2] The appellant's conviction arose from an incident on the appellant's farm on 31 January 2004. On the day in question Mr Nelson Oupa Chisale ('the deceased'), a former employee of the appellant, arrived on the farm to collect pots which he claimed he had left behind when the appellant dismissed him from his employ in November 2003. There is a dispute as to the time of the deceased's arrival – accused 1 said he arrived at 09:00; Mr Forget Ndhlovu, the security guard on duty at the entrance gate which leads to the appellant's farm, said it was at 11:00. Nothing turns on this discrepancy. Upon his arrival the deceased was confronted first by accused 1 and shortly thereafter by accused 2. They disputed that he had left any pots on the farm. Unimpressed by the deceased's persistence they assaulted him with pangas, apprehended him and tied him to a tree. Ms Thuli Siwela, employed by the appellant at the farm as a domestic worker, witnessed part of the assault and the tying up of the deceased from a distance.

[3] At about 13:00 the appellant arrived on the scene with his painting supervisor,

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

Mr Robert Mnisi, and found the deceased still tied up, injured and bleeding. He had two wounds to his head and it must be accepted, for reasons which we shall give later, that he also had an open wound at the base of his neck. The appellant asked the deceased why he had come to the farm. Instead of rendering assistance, he, too, became aggressive. According to the State witnesses he kicked the deceased once or twice on the side of his face and then asked his son, Chezrea, to fetch his pellet gun from the house. His son returned with the gun and he pointed it at the deceased. Accused 1, accused 2 and Siwela then asked the appellant not to shoot. The appellant denied that he had kicked, or pointed the gun, at the deceased. He said that he had merely threatened the deceased that should he return, he would be waiting for him with the gun.

[4] The appellant then left the scene with Chezrea. He dropped Mnisi off at the gate and proceeded to Matumi Lodge where he had to attend a parents' meeting at 14:00. Accused 1, accused 2 and Siwela remained on the farm. Before leaving the farm the appellant told Siwela that she should also leave.

[5] It was common cause that the appellant, Chezrea and Mnisi returned to the farm later that night. Whether Mnisi did so in the interim was in dispute.The appellant's version is the following. When he left the lodge he noted several missed calls to his cell phone from Mnisi. He then put a call through to Mnisi and the latter, who sounded rather agitated, reported that there had been a 'f… up' on the farm. Mnisi did not elaborate as to what had happened. The appellant then hastily drove to the farm and found Mnisi at the gate. He picked him up and they proceeded to where he had last seen the deceased tied to a tree. But the deceased was no longer there. The deceased had been removed to a shower room where he found him lying on the floor. The appellant felt for a pulse; there was none. Turning to Mnisi, he asked: 'What now?' Mnisi then suggested that they dispose of the deceased's body either by throwing it over the cliffs at Lydenburg or into a lion enclosure at Mokwalo White Lion Camp. Implying that there would be no evidence against them if the body was not found, Mnisi declared: 'No body, no murder'. Mnisi threatened that if the

appellant did not agree to the plan they, meaning accused 1, accused 2 and himself, would implicate the appellant in the murder, and get the local community to turn against him and his family. The appellant said that he felt compelled to agree to Mnisi's suggestion. He then transported the deceased's body in his bakkie accompanied by accused 1 and Mnisi and the three of them assisted one another in throwing it to the lions. The appellant admitted that before this was done he had cut the cord tying the deceased's hands together and that thereafter the cord was thrown under a bridge at Hoedspruit.

[6] The crucial issue in the appeal is whether the deceased was alive or not when he was thrown into the lion camp. According to the appellant he returned to the farm at 22:00 whereas the security guard said he arrived at 20:13. Again nothing turns on this disparity. If the times given by the witness Ndhlovu are accepted (11:00 and 20:00) more than nine hours would have elapsed from the time the deceased was injured up to the time he was taken to the lion camp. The appellant's case is that the deceased had already died before he arrived back at the farm later that night and that the cause of death must have been the injuries inflicted by accused 1 and 2 earlier that morning. The onus was on the State to establish beyond reasonable doubt that the deceased was still alive when he was thrown into the lion camp. If a reasonable possibility exists that the appellant's version is true he was entitled to be acquitted on the charge of murder. The appellant argued that the State failed to discharge this onus.

[7] The trial court found that there was 'abundant direct credible evidence that the deceased was alive when he was conveyed to and thrown to the lions'. On appeal the State sought to support this conclusion by relying principally on the evidence of Mnisi and to a lesser extent on the evidence of accused 2 as also accused 1's statement to the police. We shall deal first with the evidence of Mnisi. Mnisi was the only witness called by the State regarding the events on the farm that fateful evening. Consequently the cautionary rule relating to the evidence of single witnesses applies to his evidence. Mnisi was also an accomplice who was warned in

terms of the provisions of s 204 of the Criminal Procedure Act. The cautionary rule applying to accomplices was stated as follows by Holmes JA in *S v Hlapezula & Others*:[2]

'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; see in particular *R v Ncanana*, 1948 (4) SA 399 (AD) at pp. 405-6; *R v Gumede*, 1949 (3) SA 749 (AD) at p. 758; *R v Nqamtweni* 1959 (1) SA 894 (AD) at pp. 897G-898D. 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.'

[8] What constitutes corroboration was set out in *S v Gentle:*[3]

'It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute*[4] (cf *R v W* 1949 (3) SA 772 (A) at 778-9).'

Although the corroborative evidence must come from a source independent of the witness whose evidence is sought to be corroborated, the evidence of another accomplice can provide such corroboration: *S v Avon Bottle Store (Pty) Ltd*;[5] *S v Hlapezula*.[6]

[9] The appellant argued that the trial court erred in its assessment of the evidence of Mnisi. In support of this argument counsel for the appellant referred to a

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[2] 1965 (4) SA 439 (A) at 440D-H.
[3] 2005 (1) SACR 420 (SCA) at 430j-431a. (See also *S v Heslop* 2007 (4) SA 38 (SCA), 2007 (1) SACR 461 para 12.
[4] Emphasis in the original judgment.
[5] 1963 (2) SA 389 (A) at 393H.
[6] Above, n 2 at 440H-*in fine*.

series of alleged misdirections which would justify this court on appeal in intervening and reassessing the credibility of Mnisi and the other witnesses. Counsel argued that Mnisi and accused 2 contradicted themselves and each other and that these contradictions were disregarded by the trial court. The further submission was that the trial court incorrectly relied on the extra-curial statements of accused 1 and 2.

[10] It is settled law that in the absence of demonstrable and material misdirection a trial court's findings of fact are presumed to be correct and that they will only be disregarded on appeal if the recorded evidence shows them to be clearly wrong.[7]

[11] It is against this background that the findings of the court below must be considered. The court found Mnisi to be a 'credible and truthful' witness. The importance of the 'numerous discrepancies' the court itself found in his evidence seems however to have escaped the learned judge. They were simply dismissed as 'minor and non-material matters'. Three are important.

[12] In his statement Mnisi said that the appellant pointed the pellet gun at him and accused 1 when he told the two of them to untie the deceased and put the latter in the bakkie. That of course is inconsistent with the appellant's version that disposal of the body was Mnisi's idea. Mnisi made no mention of the pellet gun in his evidence in chief. His explanation for this omission appears from the following passage in his evidence under cross-examination:

'No you never made mention of a rifle there at that time when you gave evidence when my learned friend for the State asked you to explain what happened. --- Yes, I at that stage responded to questions put to me by the advocate for the State. I only responded to the questions and stopped.'

The explanation does not bear scrutiny. The prosecutrix repeatedly attempted to elicit the evidence, as appears from the following passages in the record:'Did anything happen from there? --- He [the appellant] then forced me and accused 1 to load him onto the vehicle. Why are you saying he forced you? --- The way he spoke to us: "Load him onto the vehicle quickly". And where is the threat [in what he] said? ---The threat was that if we do not load him onto the

[7] See eg *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645e-f and *S v Naidoo* 2003 (1) SACR 347 (SCA) para 26.

vehicle, he would injure us also. We then loaded him.

. . .

Yes, the words that were coming from Mr Scott-Crossley. --- He said: "Load this person onto the vehicle. If you do not do that, I will also injure you".

And did he indicate as to how he was going to hurt you? --- No, he did not.'

The significance of this contradiction is that Mnisi's evidence that the appellant threatened him is unreliable and in the absence of a threat, Mnisi would appear to have been a willing participant ─ which supports the appellant's version.

[13] More important was the contradiction in Mnisi's evidence about whether the deceased had been gagged. In his evidence in chief Mnisi said he did not see a piece of cloth in the deceased's mouth. This was in response to a leading question by the prosecutrix. The relevant passage in the record reads:

'Now there is evidence before this court to the effect that after he [the deceased] was loaded into the bakkie, some cloth was put in his mouth. Did you see that or did you not see? --- No, I did not see that.'

No such evidence had been led at that time. During cross-examination the witness changed his version. The relevant portion of his evidence reads:

'Did you actually see Accused 3 put the cloth into the mouth of Nelson [the deceased]? --- That is true.'

The witness' explanation for the contradiction which is demonstrably untrue was:

'Before I respond to that pertaining to the cloth, another question was put and I responded to that.'

Ultimately the witness admitted that he had told a lie in his evidence in chief; but then he immediately withdrew the admission. This appears from the following passage in cross-examination:

'Yes, what I am trying to find out: you told an untruth yesterday when you said you did not see any cloth in this man's mouth. --- Yes.

So you are saying you lied yesterday? --- No, I did not lie yesterday. I was telling what happened. He put the cloth into the deceased's mouth.'

In our view the contradiction just referred to is material. It bears directly on the question whether the deceased was alive or not. To state the obvious: there is no point in gagging a dead body. In addition Mnisi testified that when the deceased was thrown into the lion enclosure he heard him scream: 'Yoo'. In that regard he was a single witness. The contradiction concerning the gag casts doubt on whether he

could have heard the scream and whether the deceased could have screamed at all if he was gagged. All of this was glossed over by the trial court.

[14] The 'evidence' referred to by the prosecutrix in the leading question put to Mnisi came from accused 1. It was he who said in a statement made to the police that a cloth was put in the deceased's mouth and the deceased was told not to scream. The statement was admitted in evidence in terms of s 3 of the Law of Evidence Amendment Act, 1988 and in the light of the judgment of this court in *S v Ndhlovu*.[8] For purposes of this judgment we will assume, without deciding, that the statement was properly admitted in evidence. Notwithstanding its admission it remained untested. Its contents should have been carefully scrutinised in the light of the other evidence to eliminate prejudice to the appellant and the other accused. The court found that Mnisi's evidence was corroborated by accused 1 in respect of the mouth gag. The difficulty with this conclusion is that Mnisi gave two conflicting versions in this regard. The conclusion reached by the trial court is flawed.

[15] The third important contradiction in Mnisi's evidence was this. In his cross-examination he described in detail how the deceased was tied when he and the appellant first arrived at the farm. He said 'one arm was tied to a tree and the other one was tied to an aloe tree'. He demonstrated that the deceased's arms were stretched out more or less horizontal with his shoulders. He said that the deceased's legs were also 'tied like his arms. They were also stretched out' ie (as he confirmed) apart. He had already said in his evidence in chief that when he returned later that night with the appellant the deceased 'was still tied up the way in the same position as before'. But when he was questioned by the court his version changed. (This is now the second version of how the deceased was tied.) He said that when the deceased was placed on the bakkie he was untied from the tree, but his legs and feet remained tied together. That version is impossible if he had initially been tied spreadeagled which was his original version. During further questioning by the court his version as to the tying changed again (a third version). This time he said that

[8] 2002 (2) SACR 325 (SCA).

when the deceased was loaded onto the van the appellant retied his hands and feet to 'prevent him not to move or alight from the moving vehicle'. In response to further questioning by counsel as to what he had said in his statement concerning the alleged tying of the deceased by the appellant, he reverted to one of the versions he had given in answer to questions by the court (the second version):

'And it [the tying by the appellant] does not appear in your statement. --- The police official asked me who took down the statement as to whether he was still tied when he was loaded onto the vehicle and I said yes. That is why it appears on the statement.'

But that was not the version which appeared in the statement. In the statement he said:

'He told Doctor and myself that we must untie Nelson and put him in the bakkie. On [*sic*] that time he was pointing that rifle at us. We untie him and we put him in the bakkie. He assisted us to put him in the bakkie. He said we must get inside too. He drove until [*sic*] to the gate where he instructed the security to open the gate.'

Counsel for the appellant then put what was probably the final nail in the coffin by asking:

'Yes, but you did not tell his lordship and learned assessors that accused 3 [the appellant] retied him after he was put on the bakkie. --- Yes, I did not mention that yesterday.'

[16] As a basis for dismissing the contradictions in Mnisi's evidence as 'minor and non-material' the court relied on the judgment of this court in *S v Mkohle*.[9] In that case it was said[10] that contradictions *per se* do not lead to the rejection of a witness' evidence; they may be indicative of an error made by a witness and not every error made by a witness affects his credibility; and in each case the trier of fact has to make an evaluation taking into account such matters as the nature of the contradictions, their number and importance and the bearing on other parts of the evidence. But in that matter Nestadt JA was concerned with discrepancies between evidence of several witnesses on minor issues. The point is illustrated in the following passage in the judgment (at 98d-f):

'It is true that Clifford and Gloria contradict each other. Whilst Clifford stated that after the shooting he and Gloria walked away, Gloria's evidence was that the two of them had run away. Clifford said that

[9] 1990 (1) SACR 95 (A) at 98f-g.
[10] At 98f-g.

appellant held his gun in his left hand but Gloria said that it was in his right hand. Clifford and Gloria testified that appellant struck Nomute because of the manner in which she had spoken to Clifford, Nomute's explanation was that appellant was angry because she was out so late (which version corresponded with that of appellant). There was also conflicting evidence as to whether appellant was carrying a rubber, or indeed any, baton.'

Nestadt JA said[11] that in his view 'no fault can be found with [the trial judge's] conclusion that what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction".' The same cannot be said of Mnisi's evidence. In our view *Mkohle* was misapplied by the trial court.

[17] The trial court erred in another important respect. It found Mnisi to be reliable by reason of the fact that his evidence was consistent with the statement he made to the police. The court's reliance on Mnisi's previous statement was clearly wrong. The general rule is that a witness' previous consistent statement has no probative value: *R v Manyana*;[12] *R v M*;[13] *R v Rose*;[14] *S v Mkohle*.[15]

[18] The trial court further found that:

'It is strikingly significant that Mnisi is corroborated by accused 3 on his evidence that the deceased was tied up when he was conveyed to Mokwalo White Lion camp and that accused 3 used his pocket knife to cut wires with which the deceased was tied up before throwing him into the lion camp.'

The contradictions in Mnisi's evidence in regard to how, when and by whom the deceased came to be tied up, were ignored. Furthermore, the fact that the version of an accused coincides with that of a State witness on a particular point does not provide corroboration for the latter's evidence; we have already referred to what was said in *S v Gentle* in para 8 above. Matters which are common cause between the State and the accused cannot provide corroboration for matters in dispute – otherwise for example the fact that an accused in a rape case confirmed that he had had sexual intercourse with the complainant could be taken as corroboration of the

[11] At 98g-h.
[12] 1931 AD 386.
[13] 1959 (1) SA 434 (A).
[14] 1937 AD 467.
[15] Above, at 99d.

latter's version that he had done so without consent, which is plainly absurd. It is convenient to remark at this stage that cutting off of the wire binding the deceased's wrists at the lion camp by the appellant and the disposal thereof by accused 1 at the appellant's instance, does not by itself lead to an inference that the appellant killed the deceased. It is equally consistent with an intention to cover up the crime: a dead body with bound hands in a lion enclosure would inevitably excite suspicion.

[19] Notwithstanding all the contradictions to which we have referred Mnisi was found to be a 'credible and truthful' witness. That conclusion was clearly wrong.

[20] The State on appeal also relied on the evidence of accused 2 on the question of whether the deceased was alive or not when he was removed from the farm. The simplistic argument advanced by the State was that Mnisi and accused 2 corroborated each other on the fact that the deceased was still alive when the appellant returned to the farm on the night in question. But there are fundamental differences between the evidence of accused 2 and that of Mnisi. We have already referred to accused 2's version that at some stage during the appellant's absence the deceased complained that he was feeling cold whereupon Mnisi and accused 1 untied him from the tree, carried him to the shower room and locked him in by tying the door with an electric cord from the outside. Accused 2 also said that Mnisi returned to the farm with the appellant at 20:30. He continued that when the shower room door was opened by the appellant the deceased walked out whereupon accused 1, Mnisi and the appellant tied him up. Accused 2 therefore corroborates the version of the appellant to the extent that the deceased was in the shower room when the appellant returned. But the version that the deceased walked out of the shower room is difficult to accept in the light of the severe injuries that the deceased had sustained. By then the deceased would have been bleeding for more than 9 hours (from 11:00 when he was assaulted with pangas by accused 1 and 2 until 20:30 when accused 2 says Mnisi and the appellant arrived). It is obvious why accused 2 would say that the deceased had been alive when the appellant returned with Mnisi: it was he and accused 1 who had severely assaulted the deceased and it

suited him to pass the blame for the deceased's death to someone else. The court reasoned as follows in respect of accused 2's version:

'Accused 2's evidence is that the deceased was placed in a shower room, untied and locked up by tying the door earlier that evening and that when accused 3 and Mnisi came back at about 20:30 the deceased walked out of the shower room and was then tied up by accused 1, Robert Mnisi and accused 3. Mnisi's version is that the deceased was still tied up at the tree when he and accused 3 came back at 20:30. Accused 3's version is that the deceased was lying dead in the shower room when he returned with Robert Mnisi. On a consideration of all the evidence, the evidence which is credible and reliable on this matter is that contained in paragraph 4 of the statement by accused 1 (exhibit "D" above). This is consistent with the credible evidence of Robert Mnisi.'

Mnisi's evidence, as we have attempted to show in some detail, was anything but credible. No satisfactory reason is given by the court as to why the statement of accused 1 should be regarded as 'credible and reliable' ─ as we have pointed out already, it was untested in cross-examination.

[21] Mnisi and accused 2 also differed as to what happened on the farm while the appellant was at Matumi Lodge. According to Mnisi he only returned to the farm with the appellant that evening after 20:00. Both accused 1 (in his statement) and accused 2 said Mnisi had also been on the farm during the afternoon. Accused 2 said at a certain stage the deceased complained that he was feeling cold. Accused 1 and Mnisi then untied the deceased and carried him to the shower room. This version was rejected by the court on the basis that it was not put to Mnisi and was not mentioned by accused 2 in his evidence in chief. What is significant however is that accused also said that Mnisi was on the farm during the appellant's absence. If this is true the question is: why was he there and why did he himself not mention it? Accused 2 said he saw Mnisi changing positions in the yard trying to get a signal, apparently in order to phone from his cell phone. At one stage he saw him climbing on the roof. If this is true it tends to corroborate the appellant's version ─ which Mnisi denied ─ that before he returned to the farm he had received missed calls from Mnisi. It is true that Mnisi's return to the farm during the appellant's absence only came to light after Mnisi had given evidence. But there was no reason not to recall him to clarify the issue.

[22] We turn to consider the appellant's version. The court rejected it out of hand. It was the appellant's version, supported by a forensic pathologist, Dr L Wagner, that the deceased had died from injuries inflicted by accused 1 and 2 before he returned to the farm on the night in question. It is not necessary to deal with Dr Wagner's evidence. It is not readily apparent from the record as to why the appellant's evidence was rejected. The record does not show him to have been a poor witness. He did not contradict himself and the trial court in its detailed judgment made no reference to any contradictions or inconsistencies when evaluating his evidence. The court did find it improbable that Mnisi would have threatened the appellant. We do find this evidence somewhat improbable. But we cannot agree with the trial court's reasoning for rejecting the appellant's version on this point. The court referred to the appellant's evidence that Mnisi had suggested that the body be thrown off the cliffs at Lydenburg or into the enclosure at the lion camp, and continued:

'Accused 3 states that he on his own, took the decision to take the body to Mokwalo White Lion camp. His reason for this election was that it was much nearer to go to Mokwalo than to Lydenburg particularly since there was a greater risk of meeting with a police road block if they went to Lydenburg. This was an incredible piece of evidence in the light of the evidence by accused 3 that he felt seriously threatened by Mnisi and acted under compulsion when he conveyed the dead body of the deceased to Mokwalo. One would have expected that he would have chosen the route that would increase the prospect of meeting up with the police to extricate him from the compulsion.'

But meeting up with the police was the last thing that the appellant would have wanted, on his version. This would not have 'extricated him from the compulsion' ─ it would have brought about the very consequence with which (according to him) Mnisi had threatened him and which he wanted to avoid ─ namely, discovery of the body, in which case Mnisi and the other two accused would have implicated him in the murder and turned the community against him.

[23] The appellant must have appreciated that it would have fallen to him, not his employees, to explain the presence of a dead body on his bakkie or, if it had not been moved, on his farm. As a lay person, given his earlier inaction or, on the State's version, his assault on the deceased, and the deceased's subsequent death on his farm, he may well have felt at least morally blameworthy for, if not complicit in, the

deceased's death. It must moreover be appreciated that the immediacy of the crisis offered him little opportunity for pause and careful reflection. Against that backdrop and from his perspective, it would hardly have seemed likely that any explanation proffered by him would be acceptable. It is accordingly not difficult to understand him being dragooned into disposing of the deceased's body. Nevertheless, the version of the appellant that it was Mnisi ─ who played no part in the initial assault on the deceased ─ who threatened him, remains somewhat improbable.

[24] On the other hand the version of Mnisi that he was threatened and forced to transport the body is unimpressive. We have already discussed the difficulties with Mnisi's evidence in regard to the presence or absence of the pellet gun, before the deceased was conveyed from the farm. Nor did the trial court identify or list those alleged threats ─ as it did with the other factors ─ as one of the facts found proved against the appellant.

[25] The trial court said:

'It is a known fact that in general the nature of the relationship between farm workers and farm employees is characterised by docile submissiveness on the part of the servant and a domineering and overbearing attitude on the part of the master. The court has had the opportunity to observe the employees as they testified. We are satisfied that they are all typical farm workers.'

But accused 1 did not testify. In addition the evidence was that when the appellant kicked the deceased and pointed a pellet gun at him after his arrival on the scene, Mnisi, accused 1 and 2 and Siwela were anything but docile and submissive. They took it upon themselves to remonstrate with the appellant. They told him not to shoot and he stopped. It also appears that there was a close relationship between Mnisi and the appellant. From the record, at any rate, he appears to have been the appellant's trusted lieutenant. They addressed each other by their first names: the appellant called Mnisi 'Rob' and he called the appellant 'Mark'. A further example of their closeness is to be found in the evidence of accused 2 that during the fatal evening Mnisi bought beers and invited the appellant to have one with him. The above discussion illustrates the danger of stereotyping which may result in unfair and unwarranted generalisations being made. Such generalisations are to be avoided in

judicial reasoning as they may result in a miscarriage of justice. The remarks made by the court concerning the relationship between farmers and farm employees was not justified in this case and is a further misdirection. This of course does not mean that no farm workers are submissive to their employers. But the evidence in the record does not establish that such was the case here.

[26] The court *a quo* held against the appellant the fact that his full version as to everything that had transpired on the day in question was not put to certain State witnesses. The court reasoned:

'At the stage that the version of accused 3 was put to Mnisi for the first time as aforestated, the following witnesses on the facts had already testified and were cross-examined: Forget Ndlovu, Sergeant Ferreira, Zodwa Mathebula and Thuli Siwela. Accordingly the case or version of accused 3 was not put to these witnesses. The principle as stated in *S v Van As* 1991 (2) SACR 74 (W) is that the failure of the accused to put his version or case to state witnesses will in an appropriate case justify an adverse inference being drawn against such an accused when assessing or evaluating the credibility of his version.'

But it is not necessary for an accused's version to be put in all its detail to every witness who takes the stand to give evidence for the State. The limits of the obligation to put the defence version to State witnesses appear from the following passage in Phipson, *Evidence* (7th ed p 460) quoted in *R v M*:[16]

'As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness,[17] or in which he had a share. . . . If he asks no questions he will, in England, though not perhaps in Ireland, generally be taken to accept the witness's account. . . . Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation. . . . Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character. . . '.

It must also be emphasised that the failure to put a version, even where it should have been put, does not necessarily warrant an inference that the accused's version is a recent fabrication. The words 'in an appropriate case' taken by the trial judge

[16] 1946 AD 1023 at 1028. See also *Small v Smith* 1954 (3) SA 434 (SWA) at 438E-G and *S v Van As* 1991 (2) SACR 74 (W) at 108c-h.
[17] Emphasis supplied.

from *S v Van As* are important. As Davis AJA said of the passage in Phipson just quoted:

'These remarks are not intended to lay down any inflexible rules even in civil cases, and in a criminal case still greater latitude should usually be allowed.'

The learned judge went on to say:[18]

'That at that stage the girls should have been cross-examined I have no doubt; indeed, I have difficulty in imagining why this was not done. Whatever the reason it was certainly unfortunate that he [the attorney for the accused] did not do so. But in the circumstances of this case I am unable to draw any inference adverse to the accused from his failure. When Lydia was recalled it must again be said that he should have taken advantage of the opportunity to cross-examine; but then it is only fair to say that the prosecutor, or at least the magistrate, should have put the story to her at that stage. And he might well also have recalled the complainant; compare *Rex v. Filanius* (1916 T.P.D. 415 at p. 418), per MASON, J. The learned Judge, who delivered the judgment of the Court *a quo*, gave a number of points on which "severe criticism can be directed to the evidence of the appellant (the accused) and his witness (Campher)". The first is the failure to put the defence case to the two girls; this he describes as "most significant". But significant of what? Significant, as I would suggest under the circumstances of this particular case, of nothing but an error of judgment on the part of the attorney.'

The adverse inference drawn by the court against the appellant for the failure to put the full defence version to the witness Ndhlovu was not justified and a misdirection. He was at no stage at the scene on the farm. The same applies to the evidence of Siwela ─ she did not testify on the events which occurred on that fatal night as she was not present, having left shortly after 13:00 ─ and to the other witnesses mentioned in the judgment of the trial court, who were never at the farm on the day in question.

[27] Given the nature and severity of the injuries sustained by the deceased in the assault, and the period of time that elapsed between the infliction of those injuries and the appellant's return to the farm that night, the appellant's version that the deceased was already dead when he returned is in our view not improbable and ought not to have been rejected by the court. Although the court mentioned the injuries, it does not appear to have considered their significance in relation to the question whether the deceased was still alive when the appellant returned. The court

[18] At 1028-9.

accepted the word of accused 1 (in his statement) and 2 that the deceased was bleeding 'moderately' earlier in the day after they had assaulted him. But they had every reason to minimise the severity of the wounds they themselves had inflicted. Siwela also said that the deceased was bleeding 'moderately' from the head injuries. But she was viewing the whole scene from a distance. It is therefore Mnisi who provides more reliable evidence as to the wound on the neck. Yet despite its general acceptance of Mnisi's evidence, the trial court did not accept what he said on that point. Neither the spontaneous observation made by Mnisi in his evidence in chief, confirmed in cross-examination, that blood oozed from the neck wound when the deceased was breathing, which corroborated the appellant's version on this point, nor his evidence (also in chief) that when (according to him) the appellant pointed the firearm at the deceased, the latter was unable to say anything because he was injured, made any impression on the court. Nor was consideration given to the evidence of accused 2 that at a certain point in time during the appellant's absence the deceased complained of feeling cold (on a hot summer's day in Phalaborwa) and accused 1 and Mnisi carried him to the shower room.

[28] At the end of the day what the trial court was faced with was a statement by an accomplice, accused 1, which was untested in cross-examination and oral evidence of two other accomplices, Mnisi and accused 2, who were demonstrably unreliable and who contradicted each other in fundamental respects. On the other hand there was the evidence of the appellant which was somewhat improbable as to the alleged threat made by Mnisi but otherwise not susceptible to any legitimate criticism. The improbability in the appellant's evidence, such as it is, is not sufficient to carry the day for the State. As Brand JA said in S v Shackell:[19]

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot

[19] 2001 (4) SA 1 (SAC), 2001 (2) SACR 185, [2001] 4 All SA 279, para 30.

be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step.'

The conclusion is unavoidable that the appellant was wrongly convicted of murder.

[29] There can be no question however that the appellant participated in the concealment of the crime of murder and thus made himself guilty of being an accessory after the fact to that crime. He transported the body of the deceased in his vehicle and assisted in disposing of it at the lion camp so as to enable accused 1 and 2 to evade the consequences of their crime. In the circumstances the appellant should have been convicted of being an accessory after the fact to murder. This was correctly conceded by counsel for the appellant during argument before us. Counsel for the State asked for no conviction other than one of being an accessory after the fact to murder to be substituted in the event that this court found that the murder charge had not been proved.

[30] Before dealing with the question of sentence there is one matter on which we unfortunately feel it is our duty to comment. During re-examination of the appellant the trial judge referred to the following passage in the appellant's affidavit in support of his bail application:

'I am advised by my attorney that all STR DNA results and comparisons between various individuals and human remains discovered at the Mokwalo Nature Reserve [ie the lion camp] are negative. Therefore the identity of the deceased could not be established through any DNA analysing system at the forensic science laboratory of the South African Police. Due to the fact that the relevant documentation from the Department of Home Affairs regarding the identity of the deceased is absent from the police docket, and the fact that the DNA test results could not identify the deceased, the identity of the deceased is not proven beyond reasonable doubt.'

The trial judge then questioned the appellant as follows:

'And at the time we know that you took at least his body to Mokwalo Farm and threw it to the lions. You knew it. --- Sir I knew that, but I was not going to do the State's work for them.

And you said under oath that the identity of this person has not been proved. --- Sir, that was a signed document I signed in the holding cell, I was not in the court when I signed that.

But you agree that this is terribly disingenuous, because you took the body there, you knew the body was thrown to the lions, whether alive or dead, you knew it. --- The State had not proved that at that

stage.

It does not matter, you knew it. --- To me it matters sir.

You knew it. ---To me it mattered.

You knew it, you lied. --- I did not lie.'

The approach by the trial judge was unfortunate and misconceived. It was unfortunate both because he descended into the arena and expressed a firm view as to the appellant's credibility whilst he was still testifying and that is plainly undesirable.[20] It was misconceived because the two pillars of our criminal justice system are that an accused is presumed innocent until proven guilty and that the onus is on the State to prove such guilt beyond a reasonable doubt. A corollary to these principles is that an accused is entitled not to incriminate him/herself. The attitude of the trial judge was contrary to these principles. As a matter of fact, at the stage that the bail application was brought the State had failed to identify the body. As a matter of law, the accused was not obliged to assist the State in doing so. The comment by the trial judge that the accused had 'lied' was therefore without foundation in fact or law.

[31] We turn to consider an appropriate sentence. We shall deal first with the personal circumstances of the appellant. On 30 September 2005, the very morning on which he was sentenced to life imprisonment by the trial court, the appellant who was then 38 years old, re-married. Prior to his re-marriage, he had been the primary caregiver of his two minor children from his previous marriage. Although his parents divorced when he was approximately 18 years old, he had enjoyed a relatively normal childhood. At the time of the commission of the offence, the appellant employed approximately 100 people on his game farm and in his construction business. He thus contributed significantly to the socio-economic infrastructure of his local community. Despite work being scarce in the area and his having a captive workforce, his employees were reportedly well-paid.

[32] There was some suggestion in the evidence that the crime was a racially

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[20] *S v Radebe* 1973 (1) SA 796 (A) at 812H; *S v Rall* 1982 (1) SA 828 (A) at 831 *in fine*-832H; *S v Matthys* 1999 (1) SACR 117 (C) at 120i-121a.

motivated one. However, Dr M Tsele, a representative of the South African Council of Churches who was called by the State in aggravation of sentence, conceded that as the evidence unfolded he was persuaded that his initially held view that the crime was racially motivated, was wrong. 'What captivated the nation', according to Maluleke J 'was the rather frightening idea of a human being fed to lions' ─ as well it should. But it was not proved that this happened. There is a vast difference between throwing an injured man to the lions with the intention that they devour him whilst he is still alive, and disposing of a dead body to conceal a murder that has already taken place. One's instinctive revulsion at the thought of a human being being fed to lions must thus be tempered accordingly.

[33] The disposal of the deceased's body in that fashion is not without significance though, for it denied the deceased a dignified burial. Considering the importance that is attached to a proper funeral in many of our communities and the psychological need for closure, the emotional distress to the deceased's family must have been enormous. Violating a dead body is itself a crime because it 'offends the public sense of decency'.[21] Although motivated by the desire to avoid detection, the disposal of the deceased's body by throwing it to the lions must undoubtedly rank as an aggravating feature.

[34] The natural indignation that the community must feel at the appellant's conduct warrants appropriate recognition in the sentence. Nevertheless that can hardly invite a sentence that is out of proportion to the nature and gravity of the offence. Against the public interest must be weighed the unblemished record of the appellant, who, at the time of the commission of the offence, was a useful member of society upon whom some 100 people and their families were economically dependant. To his credit, the appellant has expressed contrition and remorse.

[35] Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst

[21] Milton *South African Criminal Law and Procedure* vol II p 283.

deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones. Against that must be weighed the appellant's prospects of reformation and rehabilitation, which appear to be good. It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.

[36] Accused 2 who was party to a vicious attack upon the deceased with pangas that ultimately led to the latter's slow and obviously painful death, was sentenced to an effective term of imprisonment of 12 years. Compared to accused 2 the appellant's conduct was less morally reprehensible by far. Moreover, the appellant had spent 17 months in custody awaiting trial.

[37] The sentence imposed by this court can, in terms of s 282 of the Criminal Procedure Act 51 of 1977, be backdated to the date on which sentence was imposed by the trial court but it cannot be backdated to the date upon which the appellant was arrested. Nevertheless the time spent in custody by the appellant awaiting trial can and should be taken into account by this court in determining the duration of the sentence.

[38] The conclusion to which we have come bearing all the above factors in mind is that a proper sentence would be five years imprisonment backdated to 30 September 2005.

[39] In the result the following order is made:

1. The appeal is allowed to the extent set out below.
2. The appellant's conviction for premeditated murder and the sentence of life imprisonment are set aside.
3. There is substituted a verdict of guilty of being an accessory after the fact to murder.

4. The sentence is altered to 5 (five) years imprisonment backdated to 30 September 2005.

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MTHIYANE JA
JUDGE OF APPEAL

_____
CLOETE JA
JUDGE OF APPEAL

_____
PONNAN JA
JUDGE OF APPEAL