

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



delivered 02/06/2017

Date of hearing: 8 May 2017

Date of judgment: 30 May 2017

Case number: A579/2016


Case number court a quo: SH 108/2015

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES:
YES NO

(3) REVISED.

20/5/2017
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DATE


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SIGNATURE

In the matter between:

AARON MZIMENI BANGANI

Appellant

and

THE STATE

Respondent

JUDGMENT IN APPEAL

BRENNER, AJ:

1. In this appeal against conviction and sentence, on a charge of murder, the focal issue revolves around whether the State was able to prove the guilt of the appellant beyond a reasonable doubt, in a case which hinged primarily on circumstantial evidence.
2. On the afternoon of 24 November 2014, near phase 2, Khutsong, in Carletonville, the body of a four year old, Thandiwe Matolo ("the deceased"), was found hanging from a tree, with an electric cord around her neck. She was found by four young schoolboys who had gone "hunting".
3. On 25 November 2014, the appellant, Aaron Mzimeni Bangani ("Bangani"), was arrested on a charge of the murder of the deceased. On 18 May 2016, he pleaded not guilty to the charge against him.
4. Nine witnesses testified for the State and Bangani testified in his own defence. He remained in custody throughout, and was legally represented during the trial. An application for his discharge at the end of the State's case, in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA"), was unsuccessful.
5. On 17 July 2016, Bangani was convicted of the murder and sentenced to a term of 15 years' imprisonment. On 28 July 2016, he was granted leave to appeal against his conviction and sentence.
6. It was submitted by Bangani's Counsel at the hearing of this appeal that no argument would be advanced against the fairness of the sentence. Counsel's argument was focused entirely on the sustainability of his conviction. In the result, there was warrant for a close consideration of the evidence which culminated in his conviction.
7. I turn to an analysis of the evidence.
8. The mother of the deceased, Yoliswa Matolo ("Matolo"), was at home on 24 November 2014. At about 12h00, the deceased left the house to play with another two year old child at the home of the next door neighbour. At about

14h00, Matolo went to the neighbour's house to collect her daughter, only to find her missing. The grandmother of the playmate and Matolo searched the area to no avail. At about 16h00 a woman informed Matolo that a child had been found in phase 2. By this stage, Matolo's boyfriend, who was the deceased's father, had arrived home. He went to phase 2 with one Letta, where it was confirmed that the deceased's body had been found.

9. Matolo knew Bangani well. Bangani would often send the deceased to buy cigarettes and he would buy Simba chips for the children. Matolo's children would even play at Bangani's home. On the morning of 24 November 2014, Matolo said she had seen Bangani leaving his home on his bicycle and said that he told her mother when asked that he was not going to work. It was Matolo who informed the police that she suspected Bangani of murdering her daughter. This suspicion was founded on the fact that Bangani frequently sent her children to the shops and bought them sweets and Bangani had not gone to work that day. She did not recall Bangani coming to the house on the night of the incident. The following day, after news of the death of the deceased, Bangani came to Matolo's home at about 06h00 to tell her he was sorry about what had happened. Matolo offered a motive for Bangani's alleged murder of her child. A while before the murder, Bangani's girlfriend, who was pregnant, came to visit Matolo and fell off a chair and lost her child.
10. Doctor Jwili ("Jwili"), the deceased's father, arrived home at about 15h30 on 24 November 2014 to find out that the deceased was missing. Letta then arrived to tell them that a child had been found dead in phase 2. He identified his daughter as the deceased. The police came to their home and when they had left, Bangani arrived at their home to confirm that he had heard what had happened. He was "facing down, shaking." Jwili knew Bangani as a neighbour. Bangani visited again at 06h00 the following day to inform Jwili that the people who had killed his daughter had put her in a dustbin and that Jwili should look for the marks of the dustbin wheels to find out where she was killed. He looked for tracks but found none. He had had some unclear argument with Bangani regarding liquor.

11. Sergeant Ramaphakela testified that he arrived at Phase 2, Khutsong on 24 November 2014 where he found the body of a girl next to a tree. He found five young boys seemingly hunting in the area. Sergeant Batiso arrived on the scene at approximately 14h00 to 15h00 where he observed marks on the deceased's neck, blood coming from her nose, wearing a blue dress and no panties. He asked one of the four young boys what had happened. They informed him they were busy hunting when they saw the deceased hanging from the tree. They ran to call some adults. On their return, they saw a boy unknown to them, aged about 9, removing the body from the tree. When they called him, he ran away.
12. By agreement between the parties, the statements of three of the boys who had found the deceased hanging from the tree were handed in as evidence, without the need for cross examination. All three of them confirmed having seen a young boy dragging the deceased's body away from the tree and then running away when they arrived back at the scene with some adults. This little boy was never identified.
13. Warrant officer Mokgemisa ("Mokgemisa") traced Matolo and Jwili after their daughter's body was found and went to their home at about 15h00 to tell them she had been killed. They told him they suspected Bangani because he would send their children to the shops to buy cigarettes and would buy them chips. When Mokgemisa went to Bangani's work the next day, he asked Bangani where he had been at 14h00 the previous day. Bangani gave the alibi of being with one Siyabonga. He asked Siyabonga about this and was told that they were together only from about 15h50 on 24 November 2014.
14. The deceased's blue dress was sent for DNA analysis. DNA samples were collected from Bangani's home in the form of clothes and a facecloth, and from his bicycle. The clothes were a red jacket, brown t-shirt, a light blue t-shirt, a brown vest, a brown and white cap, a red and green wash towel, khaki trousers and blue jeans. A DNA analysis report dated 17 August 2015 found no DNA of the deceased on any DNA collected from Bangani and vice

versa. There were discrepancies in the reference numbers allocated to the evidence collection kit and sealing bags. Mokgemisa was accused of assaulting Bangani and Siyabonga. He denied this.

15. Bangani was arrested on 25 November 2014. The following day, being 26 November 2014, while Mokgemisa was going around looking for information, he met Magogabe. She told him she had seen Bangani near the railway line with a child on his shoulder, and that he was walking in the direction of the place where she was found hanged. She said she knew him by sight as they stayed in the same area.
16. Elizabeth Makaya ("Makaya") testified that she worked with Bangani at an indoor sports complex. On the morning of 24 November 2014, he phoned her to tell her he would be absent from work because of "picketing" near his home, and the community had taken his bicycle away, and he was afraid to walk to work. He arrived at work the next day. Shortly after this, the police came and took him away. Bangani admitted lying to Makaya about the reason for his absence on 24 November 2014. His real reason was because he was tired after having worked for seven days in a row for his employer. Makaya conceded there were occasions, during tournaments, that employees worked for seven days.
17. Dorophina Magogabe ("Magogobe") was on her way to phase 2, Khutsong on 24 November 2014 to charge a phone because at phase 5, where she lived, there was no electricity. As she crossed the railway line at about 14h00, Bangani, coming from behind her, walked past her carrying a little a child on his shoulders. She heard him speaking to the child in Xhosa, telling the child to eat "the Simba chips" because they were "about to arrive where they were going". She knew the man by sight but not by name. She had seen him around phase 5, the area where she had been living for a short period. She was unable to identify the child, nor her clothes. She did not know the child. The man was wearing brown shoes and a blue overall.
18. They walked in the direction of houses on her right while she went to the left. Later, she learnt that a child had been hanged. On 25 November 2014,

she went to Bangani's house to check whether he was the person whom she had seen with the child the previous day. As he was about to alight the police car, she approached to look at him and he looked away, appearing to have seen her. The community was at the house. When she approached closer, so she says, he

"...made such a sign, a cross, it is not me and he faced away. So I then realised that he is the person I saw him the previous day. So I could not tell the police who were there because the community wanted to burn his house. So a meeting was called and I have explained."

19. It was after she had spoken at a meeting that the police approached her for her statement. It is plain that this took place after she had seen Bangani being placed in a police car outside his home, on 25 November 2014.
20. Pinky Rose Setwaya ("Setwaya") was outside her home at about 14h30 on 24 November 2014 when she observed Bangani going to one "Madinja's place." She overheard Bangani asking Madinja if he had heard that a child had been killed. When the community whistles started to blow, Bangani sped away and then returned afterwards. When asked which child had been killed, Bangani did not answer and took his bicycle and sped away. At about 20h30, one Mpho, the sister of the deceased, arrived at Setwaya's house to ask about the whereabouts of the deceased. Bangani denied that he went to Madinja's place at all that day. Setwaya could not explain why the deceased's sister would still be looking for her at 20h30 that day when the deceased's family knew at about 16h00 of her death.
21. Siyabonga Mokgone ("Mokgone") was the person who Bangani had allegedly spent a lot of time with on 24 November 2014. He said that he was with Bangani on 24 November 2014 when they heard a whistle being blown and heard that someone had been killed at phase 2. He testified that he had met with Bangani between 08h30 and 09h00 on 24 November 2014. They were together until about 14h30 until after they had been to the scene of the crime. It became apparent that Mokgone was deviating materially from the statement given to the police on 25 November 2014. The Court

gave the prosecutor permission to cross examine Mokgone as a result of this.

22. For the sake of completeness, the contents of Mokgone's statement provide:

"I was born 1996.11.21 and am 18 years' old and reside at house 6672 Ext 05 and I am currently a student at Soshanguve high school and my.....(illegible)

On the 2014.11.25 at about 11:30 police came to my place to ask me whether I was with Aaron Bangani yesterday at 14:00 hrs p.m on the 2015:11:24 at his place and from the morning they came to ask me that because Aaron says I was with him at his place by that time.

I explained to the police that I was not with him by that time and I was with him from 15:50 p.m. when I went to his house to go and smoke and while there we heard that a child has been killed.

After we heard that he said to me we must go there and we went to the scene on foot and on arrival at the scene we found lot of people and we saw the child and after we went back and he never said anything to me about the child.

Even on the 2014:11:25 when he came with police to me he wanted me to agree I was with him at around 14:00 p.m and I refused in front of the police I was with him that time as he was talking a lie and I told him I went to his place at around 15:50 on the 2014:11:24 I was never with him before that time.

When I was with him I notice that his behaviour was not normal he was behaving as someone who was regretting and that's all I can declare about this matter."

23. Mokgone testified that he was asked by a policeman about his movements on 24 November 2014 and the policeman wrote his evidence down. He personally read the statement, then signed it. The statement was handed in. Paragraph three was read out but he was given no chance to comment. Then paragraph two of the statement was read to him, in which he mentioned having been asked by the police whether he was with Bangani at 14h00 on the day. He was asked if this was true and his answer was "Correct". Then the prosecutor states for the record:

"Your Worship it seems the witness is now confirming the contents of his statement, I have got no further questions to him."

24. In cross-examination, Mokgone confirmed again that he went to Bangani's home to smoke at around 08h30 to 09h00 and was with him until 14h30 which was after they had been to the scene of the murder. He denied that he had only met up with Bangani at around 15h50, which is what he had said in his statement. He said he had told the police on 25 November 2014, when they approached him, that he was with Bangani from the morning until 14h30. He denied that he was assaulted by any policeman. There was no re-examination.
25. The post-mortem report on the deceased was handed in by agreement between the parties. The time of death is recorded as 03h00 on 24 November 2014. This is a patent mistake. The doctor must have meant 15h00. This is borne out by the overwhelming evidence. The cause of death cited by Dr Julian Jacobson in his report dated 26 November 2014 is: "Multiple injuries. Awaiting histology." There is no supplementary report which assesses the histology information. It is pertinent that the report noted the following serious injuries, namely: dense subarachnoid haemorrhages over the left and right frontal and parietal lobes of the head, a fractured collarbone, petechial haemorrhages on the cardiac surface, a bleeding pancreas, linear bruises on the neck, bruises to the chest, upper back suprapubic area and scratch marks across the shoulders.
26. The State closed its case and Bangani then testified in his own defence. He admitted having lied to Makaya about his reason for not going to work on 24 November 2014. He said he was tired after having worked for 7 days in a row but did not want to disclose this for fear of losing his job. This is why he told Makaya that there were riots in Khutsong, and that his bicycle had been taken away. He testified that he had a good relationship with the family of the deceased. He treated the deceased like any other child because he loved children. He knew the deceased well. He had sent her to the shops before her death.
27. On 24 November 2014, Mokgone arrived at Bangani's home at about 08h00 and they were together until they learnt of the death of the deceased from

the community at about 14h00, and they proceeded to the scene where her body was found. He never came across the deceased on 24 November 2014, prior to her death. He and Mokgone returned to his home. He changed clothes because it had been raining. He went to the home of the deceased's family at about 16h00 to extend his condolences. He spoke to the deceased's father.

28. He denied going to the house on the following morning. He denied having suggested that the deceased had been put in a dustbin and that its tracks should be found. Bangani was approached by a policeman at work the next day and taken to the police station. The police took him to phase 5 where Bangani was paraded around while the police asked members of the community whether they had seen him with the deceased the previous day. They came across Mokgone, whom Bangani said was with him on the day. Both Mokgone and Bangani were allegedly slapped by Mokgemisa.
29. He denied that he was at phase 2 with the deceased. He denied that he was wearing a blue worksuit. He was wearing brown short pants, and an orange t-shirt and a red jacket. These clothes were taken by the police. He did not see Magogabe when the police took him to his home. He made no signs to her. He said he did not know her at all. He denied having gone to Madinja's home that day.
30. Bangani denied having had any argument with Jwili concerning liquor or having had any vendetta because his girlfriend had lost her baby after falling off a chair while visiting the deceased's mother.
31. The evidence against Bangani was circumstantial. Whilst a conviction can be based on circumstantial evidence, the two rules outlined in **R v Blom 1939 AD 188 at 202-203** are required to be applied:-

"In reasoning by inference, there are two cardinal rules of logic which cannot be ignored:

- (1) *The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.*

- (2) *The proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.*"

32. The dictum of Lord Wright in **Caswell v Powell Duffryn Associated Collieries Ltd (1939) 3 All ER 722 to 733**, quoted with approval in **S v Essack and another 1974 (1) SA 1A at 16D** is noteworthy; (my emphasis included):

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are not positive proved facts from which the inference can be made, the method of inference fails, and what is left is more speculation or conjecture."

33. Finally, in the case of **S v Mtsweni 1985 (1) SA 590 (A) and 593 D to 594 G**, the court found that, while the mendacious evidence or denial of an accused is of importance when it comes to determining guilt, the Court should be cautious about attracting undue weight to this.

34. It is important not to draw the inference that, because the accused is mendacious, he is probably guilty. The weight to be given to this depends on the circumstances of every case. In the assessment of mendacious evidence of an accused, the Court held that the following must be borne in mind:

- (a) The nature, extent and materiality of the lies, and whether they necessarily indicate a realisation of guilt;
- (b) The accused's age, level of development, cultural and social background, and status insofar as they can explain his lies;
- (c) Possible reasons why people resort to lies, for example, that in certain circumstances a lie may sound more acceptable than the truth;
- (d) The tendency in some cases for a person to deny the truth because of a fear that he may become involved in an incident or crime or because of a fear that an admission of his involvement in an incident

or crime, however slight, carries the danger of an inference or guilt out of all proportion to the truth.

35. The State's evidence failed to prove guilt against Bangani beyond a reasonable doubt. It is common cause that Bangani lived near the home of the deceased, that he knew her, and that he sent her to the shops from time to time. It is common cause that Bangani was off from work on the day of the murder. On his version he was at home. He admitted that he lied to Makaya about why he did not go to work but he gave a plausible explanation for this lie.
36. The only direct evidence concerning his being seen with a child near the scene of the crime was that of Magogobe who had seen him in phase 5 where they both lived but knew him by sight not by name. The probative value of her evidence is questionable. She did not give a statement to the police implicating Bangani until 26 November 2014, after she had seen him with the police at his home, surrounded by community members. This was after the deceased's parents had conveyed their suspicion to the police that Bangani may have been the perpetrator. Her evidence may have been contaminated by what is commonly referred to as confirmation bias. She was unable to identify the child who was allegedly sitting on Bangani's shoulders while he allegedly walked past her, proceeding in the direction of phase 2.
37. The statements of the three young boys were consistent in two material respects: they all saw the deceased hanging from a tree in phase 2. When they returned after calling some adults, they observed a young boy dragging the deceased's body away from the tree. They called out to him but he ran away. He was never identified. Nor did the evidence connect him to Bangani in any way.
38. Nevertheless, the unidentified young boy's participation in the removal of the deceased's body from the tree, coupled with his running away from the scene when caught doing so gives rise to conjecture about his possible involvement in the murder. The absence of proof of any connection between

Bangani and this unidentified boy is consistent with the possibility that this boy was involved in her death, to the possible exclusion of Bangani.

39. There was no objective DNA evidence to match Bangani with having been with the deceased on the day. This would have provided some form of independent safeguard in the light of the circumstantial evidence.
40. Jwili's evidence that Bangani was "facing down, shaking" when he came to pay his condolences constitutes nothing more than Jwili's perception of Bangani's demeanour. Even if this were true, it could have been consistent with Bangani sympathising with Jwili about the death of the deceased. It gives rise to speculation.
41. The motives offered by Matolo and Jwili as to why Bangani would murder their daughter were vague and unsubstantiated and were tenuous at best. Setwaya's evidence was of little if any value. She simply averred that Bangani had alerted one Madinja to the death of the deceased at 14h30.
42. Bangani consistently maintained his innocence throughout the trial. It is correct that Bangani's alibi evidence may have been false. But by the same token, it may not have been false. That Bangani may have lied does not relieve the State from discharging its onus of proving guilt beyond a reasonable doubt.
43. A Court does not necessarily accept a prior statement as replacing the present one. Criteria such as those mentioned in **Mtsweni** should be considered. The possibility that Bangani asked Mokgone to provide a false alibi does not necessarily constitute proof of Bangani's guilt and does not exclude the possibility that he did so because he was in fear of the community and the prospect of vigilante justice being meted out against him if he did not provide an alibi.
44. The police officer before whom the statement was made, Mokgemisa, was not called to testify about the circumstances culminating in same. The volte face of Mokgone between the version in his statement, namely that he was only with Bangani from 15h50 on the day, and his viva voce evidence that

he was with him from around 08h00 and 09h00 until 14h30 on the day, remained unexplained, and gave rise to speculation. No inference can be drawn from speculation. This Court was left in doubt about the issue.

45. Mokgone's viva voce alibi evidence was not properly examined by the State to elicit an explanation from Mokgone as to why he would have lied to the police in his statement, nor, indeed, why his viva voce evidence contradicted his statement. There were also contradictions between Bangani's evidence and Mokgone's evidence about whether they were assaulted by Mokgemisa. Yet Bangani's evidence was corroborated by Matolo. Little turns on this.
46. Where a witness contradicts his previous statement, the aim is to show persuasively whether the witness has erred either because of defective recollection or because of dishonesty. The State failed to obtain clarity on the material contradictions in the versions advanced by Bangani's alibi witness, when it could and should have done so.
47. The trial Court erred in not taking into account the evidence tendered by Mokgone. In **S v Mtsweni 1985(1) SA 590 (A) 593D -594G**, the Court referred to the fact that no direct evidence linked the accused to the attack on the deceased in that case. An accused's guilt or innocence had to be determined in the light of the circumstantial evidence and the inferences which are justified on the proved facts.
48. As was stated in **Mtsweni**, the mendacious evidence of an accused does not necessarily infer his guilt. Mendacity in evidence does not always justify this most extreme inference. The weight to which such mendacity must be given must relate to the circumstances of every case.
49. The eye witness evidence of Magogabe was of insufficient weight to found a sustainable case, even in the light of the common cause facts. She identified Bangani after she had seen him at his home in the company of the police, surrounded by members of the community. It must have become apparent to her then that he was suspected of the murder of the deceased.

Her statement was only given on 26 November 2014. Eye witness evidence is notoriously problematic and subject to circumspection when the strength of the State's case relies on such evidence coupled with circumstantial evidence. Magogabe did not attend any identification parade to provide any safeguard concerning identification. She failed to identify the child he was allegedly carrying on his shoulders nor was it admitted by Bangani that the clothes she said he wore when she saw him were indeed worn by him.

50. On the totality of the State's evidence, there was simply insufficient evidence to directly link Bangani to the murder of the deceased. In the final analysis, there were no positive proved facts in casu from which the inference could be drawn that Bangani must have murdered the deceased.

51. The proved facts were such that they could not exclude every reasonable inference save the one sought to be drawn. This being the case, I was left in doubt about the guilt of the appellant. In the result, the State failed to discharge its onus of proving guilt beyond a reasonable doubt. The trial Court erred in finding such guilt, and there is therefore cause to intervene. I am unable to affirm the correctness of the conviction of Bangani and the appeal has to succeed.

52. For the reasons stated above, the following finding is made, namely:

- a. The appeal against conviction and sentence succeeds;
- b. The conviction and sentence of the appellant are set aside.


 T. BRENNER
 ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION, PRETORIA
 30 May 2017

I agree.


 J. TEFFO
 JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION, PRETORIA

It is so ordered.

Appearances

For the Appellant:

Adv L Augustyn

Instructed by:

Pretoria Justice Centre (Legal Aid SA)

Counsel for Respondent:

Adv AJ Fourie

Instructed by:

The Director of Public Prosecutions