CG CASE NUMBER: 566/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NEBRON NTUSI Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, VAN DEN HEEVER JJA et NICHOLAS AJA HEARD

ON: 23 NOVEMBER 1993 DELIVERED ON: 29 NOVEMBER 1993

J U D G M E N T

VAN DEN HEEVER JA

Bongane Kunene ("the complainant") is a salesman in the employ of Trans-Atlantic Tobacco Company in Industria in the Transvaal. He delivers cigarettes to various shops, collects money for deliveries previously made, and solicits fresh orders. Normally he is accompanied by a member of the Soweto City Council Police as an armed escort.

During the mid-morning of 17 April 1990 he went to Khanyane Store in Zola North, accompanied by constable Risimati Atlas Ndlovu who was armed with a pump gun. In the boot of his Jetta were a small safe containing about R700,00 collected from other outlets that morning, and four cases of Peter Stuyvestant, Mills, Van Rhyn and Lexington cigarettes worth about R600,00 each.

Leaving Ndlovu in the Jetta, Mr Kunene went in to do business with the proprietor of Khanyane Store, Ms Mabaso. While inside the shop he heard a gunshot. When he went out to investigate, he was seized by one man who

deprived him of the keys to his car and the money he had just received from Ms Mabaso - about R400,00 - while another pointed Ndlovu's pump gun at him. One of these, along with others who had been standing on either side of and next to the Jetta, entered it and drove off. He then saw Ndlovu lying on the ground in a pool of blood. There were a few other people in the vicinity coming in and out of the shop while this was happening. Ms Mabaso's driver took the complainant first to summon an ambulance and then to the Jabulani police station. He was still at the latter place when a report came in that his Jetta had been found abandoned in Dobsonville. He accompanied the police there. The safe had been broken open. Its contents, the cartons of cigarettes, the Jetta's spare wheel and the car radio were gone. Ndlovu died in Baragwanath hospital on the same day. He had been shot in the head at close range.

Arising out of this incident, various charges were brought against Nebron Ntusi in the Witwatersrand

Local Division, namely

1. The murder of constable Ndlovu, hereinafter referred to as the deceased.

2. Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977. The victims are alleged to be "Ndlovu and/or Kunene", the booty listed including a Winchester pump action shotgun with serial number L 2029456. (This is the firearm that had been issued to constable Ndlovu on the 17 April. It featured as exhibit 1 at the trial, having come into the possession of the State during the night of 29 April 1990 when a policeman on patrol approached a man in Naledi who fled and in his flight discarded the firearm. This man was however neither caught nor identified.)

3. and 4. Unlawful possession of a firearm and of ammunition, both the type of the firearm and the quantity and calibre being unknown (this related to the murder weapon).

A fifth charge alleged that Ntusi on 18 April 1990 was in possession of a 9 mm short Astra pistol without being the holder of a valid licence to do so.

When the matter was called on 24 August 1992 Ntusi's pro Deo counsel who had been appointed only two days earlier asked for and was granted a postponement to enable her to consult with witnesses in support of his then defence, namely that at the relevant time not only was he in hospital being treated for gunshot wounds but was guarded there by constables from the Jabulani police station. On 26 August Ntusi pleaded not guilty to all the counts laid against him. He proffered no formal statement in terms of sec 115 of the Criminal Procedure Act.

Ntusi was identified as having been the gunman who shot the deceased by two youths who had been in the street outside Khanyane Store that morning. Both admitted leaving in the Jetta when it was driven from the scene after the murder but claimed to have done so

under duress. They were regarded by the prosecution as accomplices, and were duly warned in terms of sec 204 of the Criminal Procedure Act before testifying.

The State was in the invidious position that a remarkable number of important witnesses had died or disappeared. It had to rely on the evidence of these two for the conviction it sought, and obtained. The court (Sutej J and assessors) convicted appellant on counts 1, 2 and one count of being in illegal possession of a firearm but acquitted him on the other. He was sentenced to death on the murder charge, to 13 years' imprisonment in respect of the robbery, and one years' imprisonment in respect of the firearm, the latter to run concurrently with the sentence on the second count.

He noted an appeal against the conviction and sentence on count 1 and subsequently leave having been granted to appeal in respect of counts 3 and 4, he noted an appeal on those counts also. The only issue in the appeal before us as regards the merits, is whether the

State proved the identity of the killer beyond

reasonable doubt in the light of criticism levelled

against the testimony of the two accomplices.

Hoffmann and Zeffertt in their SOUTH AFRICAN

LAW OF EVIDENCE 3rd ed at p 452 n 8 suggest that

"The Law Reports should declare a moratorium upon statements of the cautionary rule. There can hardly be a judge in the country who has not had his version in print."

Nevertheless, it is helpful to look again at the reasons

advanced as the foundation of the general proposition

that accomplice evidence should be treated with caution,

in order to consider which if any apply in this case.

The cautionary rule is one of common sense, not a rule

of thumb. I find the following reasons in the cases and

textbooks:

3. The accomplice is a self-confessed criminal.

4. He may have a motive to implicate the accused falsely. Possible motives that have been suggested are -

5. a desire to shield the real culprit;

6. a hope of clemency from the State by assisting it to obtain the conviction it seeks;

7. some grudge against the accused.

3. Inside knowledge giving him a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit.

The first reason may or may not carry weight, depending on the circumstances; but the weight should at least not be overestimated. In 1844 already Chief Baron Joy, EVIDENCE OF ACCOMPLICES (quoted in Wigmore 3rd ed Vol 7 para 2057 p 323) pointed out the illogicality of requiring the evidence of a witness with a long string of previous convictions - unbeknown, of course, to the court - to be dealt with differently from that of the co-perpetrator of some minor offence, on this ground.

> "Moral guilt, then, can never afford any rational foundation for a rule which applies indiscriminately to the highest and to the lowest degrees of that guilt - But an

> accomplice, we are told, comes forward to save himself, and his credit is affected by the temptation which this holds out to forswear himself. But who is it that establishes his guilt? He himself - he is his own accuser; and the proof, and often the only proof which can be had, of his guilt, comes from his own lips. He is generally admitted as a witness from the necessity of the thing, and from the impossibility without him of bringing any of the offenders to justice. If this be the foundation of the rule, it rests on a shifting sand. The temptation to commit perjury which influences his credit must be proportioned to the punishment annexed to the crime of which the witness confesses himself guilty."

The reasons listed under paragraph 2 must also vary in the weight attached to them, depending upon the circumstances of each case; save that 2(c) should be discounted as being a valid reason for suspicion in the case of an accomplice as such. It becomes a valid ground for suspicion against any witness once some foundation for such suspicion is laid in the facts presented to the court.

The reason given in paragraph 3 is the important one, in my view, not by itself but read with

2(a) and (b) . Inside knowledge makes an accomplice a dangerous witness because it arms him too well with all the accoutrements needed to sell a lie: that the detail is so good may lead to the false inference that the identification of the perpetrator must be good too. But this reason is hardly appropriate to a situation such as we have here, where the detail is to all intents and purposes common cause, since the murder and robbery were committed in broad daylight and the complainant told the court almost everything that happened before the two accomplices testified. He did not, it is true, see any other car (but would not have done so had it been round the corner of the building where the accomplices placed it) and could not identify the murderer, his assistant or any of those who went off in his Jetta.

The only further comments I wish to add, perhaps unnecessarily, are:

1. That there is nothing in principle which prevents a court accepting that one accomplice may corroborate

another. What weight is to be attached to the evidence of each as always depends on all the circumstances of the case.

8. That "if one had to wait for an accomplice who turned out to be a witness of that kind" (i.e. one wholly consistent and wholly reliable, or even wholly truthful in all that he says) "- or indeed anything like it - one would, I think, have to wait for a very long time" (R v KRISTUSAMY 1945 AD 549 at p 556).

9. That "circumstantial evidence may relieve an accomplice's evidence from the suspicion which a priori adheres to it". (R v GUMEDE 1949 (3) SA 749 (AD) 760.)

To come then to the evidence.

Sergeant William Mabasa took a photograph of the scene as pointed out to him by the complainant in May 1990. Khanyane "shopping centre" consists of an unplastered brick building on a corner stand with one

large opening giving access leading to three shops, one of them being that of Ms Mashobo.

The gist of complainant's evidence has already been given: it was not challenged.

Mrs Juliet Lembete lives in house no 1845B in Zola 2. About a year before the day in question, the appellant whom she knew variously as Stembiso, Mjita, and Nebron Ntusi, came looking for accommodation. She let what she called the "garage room" to him. He lived alone there, and was given the only key to it. On 18 April 1990 at about 14h00 a number of policemen arrived at her house. Only four of them entered the yard, asking for Mjita. He was not there. She herself is not always home, since she makes clothes and then goes off to sell them. She had seen neither appellant, who kept irregular hours, nor his car on the premises on the morning of the 17th. The last time she had seen him had been during the late afternoon of that day. He was then alone. The police wanted to search his room when

they came on the 18 April. Since she had no key, she gave permission for them to break a window to gain entry. From inside they opened the roll-up door of the garage. She also went inside. The police searched the room, in the course of which one lifted the mattress from the bed, after which a white policeman said "Here is the thing that we wanted" and she saw that he was holding a handgun. She did not see the actual finding of this, nor could she identify the 9 mm Astra pistol, exhibit 3, shown to her in court as the firearm she saw in appellant's room on that day. All appellant's possessions were in his room when the police searched it, to the best of her knowledge. She saw no cartons of cigarettes. After the police had gone, appellant never returned to the room. The first time she saw him again, was at Baragwanath hospital after he had been injured. After that his sister came to fetch all his belongings.

Mzwandile Cyprian Mthemba ("Cyprian") who was 16 years old in 1990, was the first of the two

accomplices who gave evidence after having been properly warned. They had originally also been charged with murder and robbery but the charges had been withdrawn. The story Cyprian told, was the following.

On 17 April 1990 at about 10hl5 he was standing at the corner of the building containing Ms Mashobo's store. The friends with him were Jerry Malohle, Thembakile Madolo, Sydney Radebe, Amos Majwayi and Frans Julius, some of whom were playing with a tennis ball, when a fawn Jetta drew up and stopped next to the entrance to the building. It had two occupants. The driver got out and went into the building. Cyprian did not see him again. The passenger opened his door but remained seated. Then a white Golf arrived and stopped around the corner from the Jetta. Where he himself was at the corner Cyprian could see both vehicles. He knew both occupants of the Golf. The driver, appellant, he knew by sight and as Mjita, and the passenger, Sam, "from the soccer field". Appellant

got out of the Golf and went towards the Jetta. The passenger noticed appellant approaching him and got out himself and stood up, armed with a weapon as long as exhibit 1. Appellant produced a handgun from the front of his trousers and when he came face to face with him fired at the passenger, who fell. Appellant then pointed the gun at Cyprian and his friends and ordered them into the Jetta. They obeyed. He thought perhaps one of his friends picked up deceased's pumpgun and put it in the Jetta, but "I cannot remember well". (What happened to it subsequently he did not know.) Mjita drove off with them in the Jetta to an address in Zola 2. When they arrived there Amos and Thembakile were no longer with them but Cyprian could not remember whether they had been dropped off en route. There appellant opened the boot of the car and asked Cyprian and his friends to carry boxes of cigarettes into an outside room. From this Cyprian inferred that this was appellant's home. He gave Cyprian two cartons of

Consulate cigarettes for his trouble.

Cyprian, Jerry, Sydney and Frans returned on foot to the scene of the shooting and heard that Sam had left with the Golf. They stayed there until the deceased was removed. Cyprian went to the police of his own accord on the following day, i.e. the 18th, after receiving a report that the police were looking for him: he surmised "there could have been some other people who saw me also, as we were being forced into the car".

One of the assessors asked him "Have you been

to the place where you off-loaded the cigarettes" to

which he answered "no", but later explained that he had

misunderstood the question:

> "I told the police the name of the person who had fired the shot and they then asked me to go and show them that place.
>
> And you did so? — Yes."

When his previous reply was put to him, he said

> "I thought the question was, did you get there alone.
>
> The question was, were you ever again back to the place where the cigarettes were offloaded.

-- I went there with the police, not on my own."

Under cross-examination the strength of Cyprian's acquaintance with appellant was tested. He said that he had seen appellant during a period of about three weeks immediately preceding the incident. Appellant came to visit men who lived in the vicinity of Cyprian's home, whom he appeared to know well. These men were not friends of Cyprian's, being much older than he, but he listened in to their conversations which were spiced with jokes which Cyprian enjoyed. It was during such episodes that he heard appellant being called Mjita.

He could give no explanation as to where two of the youths left the car. He was sure that the cigarettes that were his reward were Consulate. He said that he had inferred that someone had picked up the deceased's gun: The last he saw of it was as it dropped to the ground, but when the group got into the Jetta it

was no longer where it had fallen. In reply to the

question:

> "... The story that you have told the court . . . was it not and is it not meant to assist you to keep you out of prison, while implicating the accused in the offence?"

he said

> "No, not that I wanted to press the accused, but I was just telling them what happened."

No reason suggests itself why he should have chosen to falsely incriminate the accused in particular nor how this would have helped Cyprian himself. There was no suggestion that this 16-year old himself was implicated as the person who actually shot the deceased, and he had incriminated himself already by admitting that he had been one of the group who at least helped appellant remove the stolen goods.

He was adamant that he was making no mistake in having identified appellant as the person who shot

the deceased:

> "I say I saw him. I fail to understand if he says he knows nothing about that. ... I saw

> him shooting. ... He was there because I saw him firing. ... I say he was there or else what could I have seen if I did not see him? Q: He will further say that he thinks he is being falsely implicated in the commission of these crimes for reasons unknown to him. — I say I saw him. Now what did I see if I did not see him there?
>
> The accused will also say that he did not have any distinct relationship with you and he does not particularly know you apart from seeing you in the area. — I was not his friend either, I only used to see him."

Questioning by the Court reflected what problems in his evidence troubled the court. Firstly, he did not see complainant being robbed at gunpoint at the entrance to the building despite having been in the immediate vicinity; and inferred "if something happened so close to me, it is impossible for me not to see it. ... 1 would say that thing did not happen because I did not see it". Then he was given a further opportunity to explain how it could have come about that two of the six who got into the car at the shop, were not in the car when the car stopped at appellant's home. He could not

do so.

His evidence reads well. Bearing in mind that he had seen a man shot at pointblank range, it is to my mind excusable that he should be unaware of other events not far from that one, where events were moving rapidly. Nor is he necessarily mendacious in, more than two years later, not remembering that two of his companions had been dropped off en route to appellant's home, as Thembakile explained had happened.

What I do find unusual, is that neither pro Deo counsel nor the court challenged his implied excuse for his own participation in what followed on the shooting, namely that he had been threatened by appellant. The lack of challenge is most likely due to the inherent improbability of the story. An educated guess would be that the youngsters were roped in to keep a lookout on behalf of the robbers, and perhaps even to carry cartons from the Jetta to the Golf though that plan changed. But again, it is not unnatural for an

accomplice to try to paint himself prettier than he was. The crucial question is whether there is any danger that such an attempt might lead to his transferring blame from himself to another.

The second accomplice was Thembakile Madolo, 19 years old at the time of the murder and without doubt a poorer witness than Cyprian had been. He was one of the five youths in the open area outside the "shopping complex", but was around the corner from the entrance to that building when he saw a white Golf arrive with two occupants. He pointed out the appellant as having been the driver. He saw appellant get out holding a gun which he tucked into the front of his trousers as he did so. Appellant then moved towards the front of the building and shortly afterwards Thembakile heard a shot. He had earlier seen a Jetta arrive at the shop, the driver of which got out while the passenger, whom he afterwards heard bystanders refer to as a policeman, remained behind. When Thembakile went to investigate

after hearing the shot "I found the policeman already lying down"; though two sentences later he says he saw deceased bending down over the car with his face downwards after he had climbed out of the car. He saw appellant there, between the shop wall and the Jetta, holding a handgun. The only other person in the immediate vicinity was Frans Julius, coming from the direction in which the Jetta was facing.

Then appellant "called us to the car to help him take the cigarettes". They did. The cigarettes were lying on the ground. They picked them up and placed them in the boot. "Then he asked us" (which he soon changed to 'ordered' us) "to get inside the car and go away with him." He, Cyprian, Jerry, Amos and Mjita himself (i.e. the appellant - he had heard from Cyprian that that was appellant's name) did so. After a leading question from the prosecutor, he added Sydney to the list. Frans, he says, did not accompany them. They drove away. Appellant dropped the witness and Amos off

at Emdeni, complaining that the car was over-full. What happened further to the Jetta and its occupants he did not know. His younger brother told him later that same day that the police were looking for him, and the following day he went to the Jabulani police station of his own accord.

He did not see the actual shooting, nor how cigarettes came to be outside the Jetta on the ground, nor what happened to the deceased's firearm. He had obeyed appellant's order to help him through fear:

> " I was afraid because I saw that the accused was in possession of a firearm and I also saw the other man lying on the ground."

The prosecutor, as in duty bound, put to this witness a statement he had made to the investigating officer Warrant Officer De Waal, on the 23 April 1990 which differed from his oral testimony in the following respects: In that, he had said deceased remained in the car. In court he said deceased got out of the car.

In that he said he saw the gunman shooting the

deceased. In court he said he only heard the shot.

In that, he said the gunman picked up the deceased's firearm and put it in the Jetta. In court he said he did not know what had happened to the security-guard's firearm.

Thembakile explained these discrepancies by saying: "I think it was the policeman who wrote down my statement who did not hear me clearly". Under cross-examination further self-contradictions emerged - for example, whether he was playing ball in the company of four friends or five on that day - in other words whether Frans was part of the group or, as I infer, was fortuitously on the scene; and what Thembakile could see at certain stages of the events. Of note is that his evidence in court is watered down, compared with his earlier statement; which one would hardly expect from someone out to incriminate an accused falsely.

He too did not see complainant being confronted and robbed by a second man, armed with

deceased's pumpgun. He admitted without hesitation that appellant was a stranger to him.

> "The accused will say in this court that he does not have any particular relationship with you. He will say, however, that in the course of his living in the area and driving taxi's in the area, he has seen you on various occasions and there is a great likelihood that you also know him as a taxi driver? — No, I do not even know him. It was my first time to see him. He does not know my home. I also do not know where he stays."

The last state witness was Warrant Officer De Waal. He testified mainly as to the problems the State experienced with witnesses. Sydney Radebe was in Leeuwkop Prison. Frans Julius was dead. Samuel Simila, who had not been charged along with appellant, Cyprian and his friends, was untraceable, nor had Amos Mazwayi yet been found despite a warrant being out for his arrest. The pistol before court, exhibit 3, he had received from constable Bouwer. The latter, constable Maringa and constable Radebe had been together when Bouwer found it but there was no link to pinpoint this

weapon as the one Mrs Lembete had seen in appellant's room on the afternoon of the 18 April since all three these police witnesses had died. Two had been shot and one killed in a motor accident. De Waal could not discover who the fourth policeman had been that Mrs Lembete saw in her yard on that day. Nor had any bullet been recovered from the corpse which could form the basis of any expert ballistic testimony. It was this gap in the chain of evidence that led the trial court to acquit the appellant on a second charge of illegal possession of a firearm: the handgun found in appellant's room was probably the one used to kill the deceased, not one in addition to another different murder weapon.

De Waal visited appellant in hospital after he had been shot. His evidence that this was after his arrest by Bouwer, while attempting to escape, was clearly inadmissible hearsay, but appellant's evidence of how he had come to be injured and why he was guarded

in hospital was nonsensical and raised no other

reasonable possibility. Indeed, under cross-examination

as to why he had not reported the assault upon him to

the police, he to all intents and purposes admitted what

Bouwer said:

> "The fact that I got injured and was guarded by the policeman at the hospital who thereafter left me did not give me the idea that I should go to the police"

though he changed his evidence later. De Waal succeeded

in taking a statement from appellant and obtaining his

fingerprints only a year later when appellant was living

at Orange Farm. He had not been in custody before then

and after De Waal saw him in hospital.

Appellant gave evidence in his own defence.

In evidence in chief, he said that he had a family in

Msinga in Natal, where he was born. The trial judge's

comment: "The home of faction fighting", put ideas in

appellant's head. When asked whether he knew why he had

been falsely implicated in events of which he knew

nothing, he said he thought it was perhaps "because of this faction fighting". (This suggestion caused him problems under cross-examination, during which he rambled and evaded questions.) He said he did not even know where Khanyane Store is, had only heard its name. Asked by his counsel where he had been when the murder and robbery were said to have been committed, he replied:

> "When I am in the township I move about. I cannot precisely say where I was at a certain time except in the morning when I washed the car."

That was in the garage at Ekwezi station. This story was never followed up. He said that he had never owned a firearm.

Asked whether he knew Cyprian, he said "His face is familiar, m'lord, I am used to his face because ... I am operating a taxi and I pick up every passenger on the road". Thembakile' s face was familiar, but he could not say for sure that he had seen him.

He operates a taxi from First Gate in Emdeni (and it will be remembered that Thembakile said he had been dropped off in Emdeni).

He had been hospitalized at Baragwanath after having been shot from behind while doing repairs to his car. When he came to in hospital, constable Radebe was guarding him.

Under cross-examination he admitted that his nickname is Mjita; that he possesses two vehicles, a white Golf and a Combi taxi, and that he had owned the Golf already on the day of the robbery. He had laid no criminal charges, arising either out his having been shot, about which he had consulted a lawyer, nor about his room having earlier been broken into although he did not believe that the persons responsible for that really were members of the force. His reasons for not reporting the shooting range from that quoted earlier, through "I never believed there was anything the police could do for me" to "I was waiting to recover fully".

30 He admitted that after he discovered that the police had broken into and searched his room on 18 April 1990 he had not returned to stay there but moved first to Kagiso in Krugersdorp, an inconvenient distance from his area of operations as a taxi owner, having been told that the police were looking for him. On his discharge from hospital in the absence of his guard, he fled further, leaving Kagiso and moving to Orange Farm.

The reason he gives for not having collected his possessions from his room at Mrs Lembete' s, is a complete non seguitur. And he admits that he was on the run but because of some unexplained fear for his life, not fear of the police.

His story of how he discovered that the police were on his track also varied. His first version was that Mrs Lembete had told him that the police were looking for him. When confronted with her evidence that she did not see him until much later, in hospital, he became vague: he could not say precisely who gave him

the information since many people lived on the premises, she and her sons; and he had been confused at that stage.

He admitted Mrs Lemete's evidence that he had lived alone in her garage room, had the only key to it and always locked it when he left. He knew of no one who could have left a gun there.

The court a quo accepted the evidence of complainant and Mrs Lembete unreservedly and held appellant to have been evasive and his tale of either police lawlessness or police impersonators to explain his flight from home, untrue. And the trial court was aware of the flaws in the evidence of both accomplices and its duty to regard that evidence with caution.

In my view it cannot be faulted for having accepted the truthfulness of the evidence of Cyprian, backed up by Thembakile, that appellant was the person who had shot deceased. There is no room for a merely wrong identification having been made here. Even if

the evidence of the two youths, that they did not see a person other than appellant rob complainant at the entrance to the building, were false, that could mean only that they wished to shield that other, whether Sam or one of their own group. It does not affect appellant's position. The inference that he was not implicated falsely in the events, is in my mind unavoidable. Appellant did not suggest that there was any reason why Cyprian should have known where appellant lived. Cyprian after having reported himself to the police, led them there as being Mjita's home where cigarettes had been off-loaded. None were found, but sufficient time had elapsed for appellant to have disposed of them. What the police did find, was evidence that appellant had had the wherewithall with which he could have done the deed. And, most telling, appellant's immediate flight, leaving behind all his possessions, and his lies, clinch the matter.

That leaves the matter of sentence to be

considered.

The murder was carefully pre-planned, committed with direct intent, to enable the appellant and his accomplice or accomplices to perpetrate a robbery. It constituted both a cold-blooded execution of a man taken by surprise and given no opportunity to defend himself, and an assault on the foundations on which an orderly society rests. The only mitigating circumstance is that appellant was a first offender. The trial court commented on the escalation of this type of ruthless crime within its jurisdiction. In my view the rehabilitation or potential rehabilitation of the appellant must yield to the needs of retribution and deterrence. The death sentence is therefore the only proper sentence for the offence committed. The appeal is dismissed.

L VAN DEN HEEVER JA

CONCUR:

VAN HEERDEN JA)
NICHOLAS AJA)