THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE **NOT CASE**
NO: 042/2006

In the matter between

DIRK HERMANUS SWANEPOEL **1ST APPELLANT**

LOUIS ALBERTUS KILLIAN **2ND APPELLANT**

and

THE STATE
RESPONDENT

CORAM: **MTHIYANE JA, COMBRINCK and MALAN AJJA**

HEARD: **2 NOVEMBER 2006**
DELIVERED: **1 DECEMBER 2006**

Summary: **Appeal against conviction – Admissibility of a pointing out and accompanying statements alleged to be tainted by unprofessional conduct of attorney representing appellants – Sufficient circumstantial evidence available to link both appellants to the crimes charged.**

Neutral Citation: **This judgment may be referred to as DH Swanepoel v The State [2006] SCA 171 (RSA).**

JUDGMENT

MTHIYANE JA:
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[1] The first appellant, Mr Dirk Hermanus Swanepoel, and his half brother, Mr Louis Albertus Killian, the second appellant, were arraigned in the South Eastern Cape Local Division of the High Court before Kroon J, (sitting with two assessors) on counts of murder (count 1), robbery (count 2), unlawful possession of a firearm (count 3) and possession of ammunition (count 4). They were both convicted on counts 1 and 2 and sentenced to 22 years and 10 years' imprisonment respectively. The 10 year sentence for count 2 was ordered to run concurrently with the sentence imposed in respect of count 1. In addition, the first appellant was convicted on count 3 and 4 and sentenced to 4 years' imprisonment, and 1 year's imprisonment respectively. Two years of the sentence in respect of count 4 was ordered to run concurrently with the sentence imposed on count 1. The 1 year sentence in respect of count 4 was ordered to run concurrently with the sentence imposed in respect of count 3. The appellants appeal to this Court against their convictions with leave of the court *a quo*.

[2] This case arose from the disappearance of Mr Lukas Albertus Theunis Johannes Groenewald a Humansdorp businessman and the subsequent discovery of his body on 23 January 2002. The evidence established that Groenewald (the deceased) had left his house on 15 January 2002 at about 13.30 in the company of an unknown man clad in a

blue overall. Before the man came to the house the deceased had received four calls from a cell phone number 073 1754759: two of the calls came through to his cell phone while the other two were directed to the telephone at his residence. At about 14.45, the deceased telephoned his wife from his cell phone and requested that she give R10 000 in cash to the man with the blue overall. Shortly thereafter this man returned to the house now driving the deceased's 4 X 4 bakkie. Mrs Groenewald handed him R10 000 cash in R100 notes, after making him sign the receipt which he signed under the name Peter Gerber. Before the man left he told Mrs Groenewald that the deceased had purchased a bakkie at Oesterbaai and that this vehicle had broken down.

[3] The deceased made no further contact with his wife and did not return home that night. Mrs Groenewald reported his disappearance to the police and instructed a local attorney, Mr Hennie Nel, to help search for him. Nel engaged an advocate and instructed a private detective to assist with the search. Based on what Mrs Groenewald had told him about the alleged purchase of a bakkie which was supposed to have broken down, Nel thought that the first appellant, who was a motor mechanic, specialising in repairing starters, could help trace the deceased and possibly link the two men who were at the time strongly suspected of being involved in the deceased's disappearance. They were believed to have been seen driving around in a bakkie in the vicinity of the deceased's house at about the time he left his house. On 22 January 2002 Nel telephoned the first appellant's place of business, Pro-Diesel, and left a message for him to come and see him. The first appellant called at Nel's office whereupon Nel questioned him about the deceased's disappearance and about Gerber and Jansen. To his surprise the appellant denied knowledge of the two individuals and of the deceased's whereabouts. He

also denied any knowledge of the 073 cell number.

[4] According to Nel's evidence the first appellant came to his office at about 08.00 on the next day. While Nel and the first appellant were in the office Inspector Jancke arrived and asked the first appellant to accompany him to the police station. During cross-examination it was suggested that the removal of the first appellant from Nel's office had been pre-arranged with Nel. This was denied by Nel. There is a dispute as to whether the first appellant was at this point arrested or not. This was denied by Jancke who said that he had been told by the first appellant's wife that he was at Nel's office. He went there to take the first appellant at the police station in Humansdorp for questioning. Later that afternoon the first appellant telephoned Nel from the detectives' offices and revealed for the first time his involvement in the deceased's disappearance. Even at that stage Nel thought that the first appellant's only involvement related to knowledge of the whereabouts of Gerber and Jansen, and to information linking these two men to the deceased's disappearance. And so, when the first appellant asked Nel if he should co-operate with the police, Nel did not hesitate to suggest that the appellant should co-operate fully with them. To Nel's utter amazement, so he said, the first appellant indicated that he was deeply involved in the matter and that he wished to make a clean breast of it, in order to clear his conscience. At the request of Nel, Detective Inspector Pietersen had left the first appellant alone in the office to allow them a private conversation. The first appellant then asked Nel if it would help him in a bail application if he co-operated with the police. Pietersen confirmed that he would be prepared to give favourable evidence in a bail application. Nel asked Pietersen to make that clear to the appellant. Nel indicated to the appellant however that it was up to the court hearing the bail application to decide whether he should be granted bail or not. He

did not give the first appellant any assurance that he would get bail.

[5] Subsequently the first appellant made a pointing out and gave certain incriminating statements linking him and the second appellant to the murder and robbery of the deceased. On 23 January 2002 he went to point out the spot where the body of the deceased was found buried covered with bushes and leaves. He also took the police to the spot where the firearm, a 9mm pistol which was used in the killing and described in the charge sheet, was found. The weapon bore the inscription 'Israel Military Industries'.

[6] A post-mortem examination was performed on the body of the deceased by the district surgeon, Dr Van der Merwe, on 24 January 2002, in the presence of Prof Saayman, a private pathologist of Pretoria University. At the time of the trial, Dr Van der Merwe had emigrated and was no longer available to testify. Prof Saayman, engaged by the family, gave evidence for the State. According to the post-mortem report, the deceased died of a bullet wound through his head.

[7] It is convenient to deal first with the second appellant. Mrs Groenewald testified that the man who left with the deceased on 15 January 2002, fetched money from her and brought back the deceased's bakkie wore new blue overalls. He received R10 000 in R100 notes from her. The evidence of Mr Isak Ignatius Williams was that the second appellant was in Humansdorp at the first appellant's business on the day of the deceased's disappearance. He was given a new blue overall jacket by the first appellant, at the latter's place of business. When he left Pro-Diesel, the first appellant's place of business, the second appellant wore a blue overall. Although Williams was not a very good witness his evidence

on this point is supported by that of Mrs Groenewald, whose credibility is beyond reproach. In any event, the blue overall was mentioned by Williams in his very first statement, at the stage when he could not possibly have been aware what Mrs Groenewald had said or that the deceased had already been murdered. The court *a quo* cannot be faulted for accepting his evidence on this point.

[8] Then there is the evidence of the second appellant's handwriting. The handwriting expert, Mr Marco von Hamman, testified that it was highly probable that the signature on the document in which Mrs Groenewald made the person who fetched the R10 000 sign was that of the second appellant. It was not put to Von Hamman that the second appellant would deny that he appended the signature in question. The second appellant did not take the witness stand to dispute Von Hamman's evidence.

[9] I turn to the evidence of the second appellant's fingerprint lifted by the fingerprint expert, Mr Phil Muller from the deceased's vehicle on 16 January 2002. The fingerprint was found on the outside of the top corner of the left window. According to Muller the print was made by someone with the fingers of his right hand, as he was probably trying to close the door from the inside. It is not disputed that the finger print is that of the second appellant. The only reasonable inference that can be drawn from these facts is that it was the second appellant who drove in the deceased's bakkie and that it was he who collected R10 000 from Mrs Groenewald. In the absence of any evidence from the second appellant the conclusion is unavoidable that he made common purpose with the first appellant to rob and murder the deceased and was therefore correctly convicted by the court *a quo*.

[10] Mr Price, for the appellants, submitted that the second appellant should have been convicted of robbery and not murder. I do not agree. In his case there is not only direct evidence of his signature and fingerprint but also strong circumstantial evidence. The cumulative effect of all of this evidence is sufficiently compelling to link the second appellant to the robbery and murder of the deceased.

[11] In my view the second appellant was correctly convicted.

[12] I now turn to the first appellant. The main thrust of the first appellant's attack on the conviction is that the evidence of the pointing out and incriminating statements accompanying the pointing out should not have been admitted in evidence at the trial. It was contended that this evidence was tainted and should have been excluded in terms of s 35(5) of the Constitution. The section reads:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

The complaint is that Nel acted improperly by representing both the deceased's family and the first appellant. This resulted, it was submitted, in a conflict of interest and a violation of the appellant's right to a fair trial. Mr Price, submitted that Nel's advice that the first appellant should co-operate fully with the police, albeit *bona fide*, led to the appellant agreeing to accompany Superintendent Henry Trytsman to make a pointing out and to give incriminating statements.

[13] Nel denied ever advising the first appellant to make the pointing out or to confess to the charges he was facing. The first appellant did not give evidence in his defence on the merits and neither did he during the two trials within a trial, which were held to consider the admissibility of the pointing out and the statements accompanying the pointing out. At the

conclusion of the two trials within a trial evidence relating to the pointing out and the said statements was admitted. The court found that the pointing out and the statements were made freely and voluntarily without undue influence.

[14] Mr Price submitted that all the evidence of the pointing out and the statements following Nel's advice should have been excluded as it was tainted. He submitted that as soon as Nel realised that there was a conflict of interest he should have withdrawn as the first appellant's attorney. Counsel submitted that his failure to withdraw was so prejudicial to the appellant that his right to a fair trial was severely compromised.

[15] Nel resolutely stuck to his view that he did not consider that there had been a conflict of interest. Humansdorp, he said, is a small town and the first appellant must have known that Nel was acting for the deceased's family. He conceded that the deceased was during his lifetime, one of his biggest clients and this fact, too, he asserted, must have been known to the first appellant. He disowned the first appellant as a client, stating that he only had done some peripheral work for him in 2001. He testified that when the first appellant telephoned him to ask if he should co-operate with the police, he did not regard this as creating an attorney - client relationship.

[16] The version advanced by Nel concerning whether or not an attorney - client relationship existed between him and the first appellant is not very convincing. Clearly the first appellant thought that Nel was his attorney, so did those who had contact with them. The police thought that Nel was acting for the first appellant and so did the magistrate, Mr Hechter, to whom the first appellant was taken to make a confession. Nel

did nothing to correct that impression. Instead, he went ahead and took the first appellant to Mr Hechter and told him that the first appellant was willing to make a statement. This was after the first appellant had initially been taken to the magistrate to make a statement, in the absence of an attorney. Nel did, indeed, place himself in a position where he gave advice to the first appellant at a time when he knew he had instructions from the deceased's family. In these circumstances the conclusion that a conflict of interest existed is unavoidable. It is true that Nel did not advise the first appellant to make a pointing out and to confess. That finding cannot be made. What he said was that the first appellant should co-operate fully with the police – without elaborating on how he should do so. This advice, so closely connected in time to the pointing out and the statements made by the first appellant, might be perceived to have resulted from Nel's advice. Nel's failure to advise the first appellant of his rights under the Bill of Rights, such as the right to remain silent, in my view, left the first appellant, who was facing serious charges, effectively without representation. Although Nel acted *bona fide*, the risk of admitting evidence preceded by such conduct could well have resulted in a failure of justice. Consequently I am prepared to assume in favour of the appellant that there was a conflict of interest and that Nel should have withdrawn from the case and should not have continued to act for the first appellant. It would therefore not be safe to rely on the evidence of the pointing out and the accompanying incriminating statements as was done by the court *a quo*.

[17] At the trial the State did not solely rely on the evidence of the pointing out and the accompanying statements. It led other evidence pointing to the guilt of the first appellant, which was not challenged by the defence. In what follows I deal with it briefly. Firstly, before the

deceased left his house he received four calls from a 073 cell number which was later identified to be that of the first appellant's wife. When confronted the first appellant and his wife denied any knowledge of the 073 number. The first appellant's denial of any knowledge of the number was clearly proved to be false. Neither the first appellant nor his wife gave evidence to explain why the deceased was called on the day he disappeared. There was no suggestion by the defence that any other person had access to the 073 number other than the first appellant and his wife.

[18] If one has regard to the time of day when the calls came through, they tie up with the evidence given by Mrs Groenewald. The calls from this number came through at 11.27, 11.31, 11.32 and at 12.46. The last two calls came through to the deceased's cell phone number. According to Mrs Groenewald the second appellant arrived at their house at about 13.30. He shouted outside the gate and Mrs Groenewald answered whereupon the deceased told his wife to let the man in as he was expecting him. This was some 46 minutes after the deceased had been called from the 073 number. The printout supplied by MTN showing the record of calls made that day including the four calls referred to above, indicates that the cell phone (handset) used to make the four calls was that belonging to the first appellant. It would appear that the sim card with the 073 number was inserted in the appellant's cell phone when the calls were made. MTN was able to link the calls made with the 073 sim card to the first appellant's cell phone by means of the IMEI (International Mobile Equipment Identity) number 33008553300299. It seems that the IMEI number is to the cell phone what the fingerprint marks are to a human being. All calls made from the first appellant's cell phone reflect his IMEI number. It does not matter what sim card was

used. The conclusion is therefore unavoidable that the person who telephoned the deceased shortly before he was fetched from his home by the second appellant was the first appellant. The proved facts point conclusively in that direction.

[19] Secondly there is the evidence of blood found in the vehicle belonging to Mrs Janeke who had taken her bakkie to the first appellant's business for service. The blood was in the back of the vehicle and on the mattress in the back. The DNA analysis established that this was primate blood. This evidence was not challenged. The evidence suggests someone who was bleeding must have been in the back of Mr Janeke's bakkie. There is no explanation from the first appellant as to how primate blood got onto the vehicle that was sent for a service on the same day that the deceased disappeared.

[20] Prof Saayman said that the deceased was shot with either a 9mm or 7.65mm pistol. Vermeulen, an admitted acquaintance of the first appellant, testified that in November 2001 he had handed a 9mm pistol bearing the words 'Israel Military Industries' to the first appellant. This evidence shows that the first appellant was in all probability in possession of a firearm at about the time of the deceased's death.

[21] There is also the evidence of Mrs Groenewald that the man with the blue overall, who, as I have found, was the first appellant's half brother, the second appellant, received R10 000 in R100 notes from her. On that very day the first appellant's wife who works for the first appellant at his business deposited R6000 in R100 notes, after making arrangements with Mrs Walters of First National Bank to make the deposit after hours.

[22] As already pointed out Williams testified that it was the first appellant who gave the second appellant the blue overall. All of these pieces of evidence in my view sufficiently link the first appellant to the murder and the robbery even without reference to the pointing out and any confession that the first appellant might have made.

[23] All the evidence taken together lead to a compelling conclusion that the first and second appellants worked hand in glove in the murder and robbery of the deceased. The following passage in DT Zeffertt et al *The South African Law of Evidence* (at page 94) is apposite:

'Circumstantial evidence is popularly supposed by laymen to be less cogent than direct evidence. This is, of course, not true as a general proposition. In some cases, as the courts have pointed out, circumstantial evidence may be the more convincing form of evidence. . . . there are cases in which the inferences will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard. All one can do is to keep in mind the different sources of potential error that are presented by the two forms of evidence and attempt, as far as this is possible, to evaluate and guard against the dangers they raise.'

(See also *Mcasa v The State*, Case No 638 of 2002, unreported judgment of this Court delivered on 15 September 2003 at para 8).

[24] The appeals of both the first and the second appellants are accordingly dismissed.

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KK MTHIYANE

JUDGE OF APPEAL
CONCUR:

COMBRINCK AJA
MALAN AJA