THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 236/09

MAGIEL BURGER First Appellant

FELOKWANE GOQO Second Appellant

JOACHIM PRINSLOO Third Appellant

and

THE STATE Respondent

Neutral citation: *Burger v The State* (236/09) [2010] ZASCA 12 (12 March 2010)

CORAM: Navsa, Mthiyane, Mlambo, Cachalia JJA and Majiedt AJA

HEARD: **16 February 2010**

DELIVERED: **12 March 2010**

CORRECTED:

SUMMARY: **Circumstantial evidence insufficient to sustain conviction on a charge of murder kidnapping conviction not warranted undesirable interrogation methods discussed blurring of lines between**

official and private investigations criticised police officials acting in two capacities unacceptable.

ORDER

On appeal from: High Court, Pretoria (Makhafola AJ sitting as court of first instance).

1. The appeal against both convictions is upheld and the convictions and related sentences are set aside.
2. The cross-appeal against sentence is dismissed.

JUDGMENT

NAVSA JA (Mthiyane, Mlambo, Cachalia JJA and Majiedt AJA concurring)

[1] On 2 October 2007 the three appellants, who at material times were policemen,[1] were each convicted in the Pretoria High Court (Makhafola AJ) of the kidnapping and murder of Mr Sandy Botomane (the deceased). On the same day each was sentenced to 12 months' imprisonment on the first count, and to life imprisonment in respect of the second.

[2] The present appeal is before us with the leave of the court below. The appellants appeal against their convictions and the sentence of life imprisonment and the State, against the sentence in relation to the kidnapping conviction. The

[1] The third appellant, Mr Jaochim Prinsloo, was a police reservist at the time and was acting as such.

appellants contend that the former sentence is too severe and the State, that the latter is too lenient.

[3] The primary question for consideration is whether the court below, in coming to the conclusions referred to above, correctly assessed the evidence in relation to each count. Of particular importance in this regard is the approach to be adopted insofar as circumstantial evidence is concerned. I turn to deal with the material facts.

[4] It is common cause that the badly disfigured body of the deceased was found on the N1 national highway near Vanderbijlpark, during the early morning hours of 24 May 2000, in circumstances that appeared as if he had been the fatal victim of a hit-and-run motorist.

[5] The events that occurred shortly before and in the weeks leading up to the discovery of the deceased's body are important. They are set out hereafter.

[6] The deceased was a ticket seller in Pretoria, for Putco, a bus company. Two to three months before the discovery of the deceased's body there had been a theft of R1, 2 m from the Putco office where the deceased had been employed. The theft was reported to the South African Police Services (SAPS) and private investigators, Associated Intelligence Network (AIN), were appointed by Putco in an attempt to find the perpetrators.

[7] As a result of polygraph tests conducted by AIN, several Putco employees were identified as possible suspects, including the deceased and Mr Titus Seboka. These tests were conducted on 16 May 2000.

[8] The lines between the investigations by the police and AIN, respectively, became blurred. For eg, Mr Henry Beukes, who was accused 1 in the court below and who was discharged at the end of the State's case, was employed 'in a temporary capacity' by AIN whilst in the employ of SAPS and whilst he was on 'sick leave'. In colloquial language, Mr Beukes appears to have been 'moonlighting'. As will become apparent from what appears later in this judgment it is not altogether clear whether particular instructions issued were at the instance of the police or by AIN.

[9] On 18 May 2000 Mr Beukes was informed that an unauthorised ticketing machine had been found in the deceased's possession.

[10] On 22 May 2000, whilst he was on 'sick leave', Mr Beukes, apparently acting on behalf of AIN, requested the assistance of the three appellants, in their capacities as police officials. It was this request that led to their encounter with the deceased.

[11] Mr Beukes had ascertained that a warrant of arrest had been issued in respect of Mr Seboka, unrelated to the theft from Putco. He decided that this presented an opportunity for the police to interrogate Mr Seboka concerning the theft. In his statement in explanation of his plea of not guilty in the court below, Mr Beukes stated the following:

'It is a well-known fact in the police that when a person is in detention such a person is more willing to co-operate with the police and divulge full information to the police than otherwise….'

I shall, in due course, comment on the 'well-known fact' referred to by Mr Beukes and its application in the present case and generally.

[12] It is common cause that during the night of 22 May 2000, leading into the morning of 23 May 2000, Mr Beukes and the three appellants, in search of

Mr Seboka, went to his parents' home in Atteridgeville, Pretoria. They did not find him there. According to the testimony of the first and third appellants, this caused them, in consultation with Mr Beukes, to decide to go to the deceased's house to see if he could lead them to Mr Seboka.

[13] The three appellants travelled to the deceased's house In Atteridgeville. They woke him and identified themselves as policemen. They told him that they were there to 'pick him up' to question him about the theft at Putco. Ms Stella Motileng, the deceased's girlfriend and his brother, Mr Benson Botomane, were present. The deceased was instructed to get dressed. He complied and accompanied them to their vehicle.

[14] The appellants, upon enquiry from the deceased's girlfriend and his brother, said that they were taking him to the Atteridgeville police station. According to Ms Motileng she specifically directed her question to the second appellant and he responded by stating that they were taking the deceased to the Atteridgeville police station. The deceased entered the police vehicle and they drove off with him.

[15] Importantly, as the deceased departed with the police he told his girlfriend, who was concerned about his safety, that he had his cellular telephone and would call her, if necessary. The deceased left his house with the three appellants shortly after 02h00 on the morning of 23 May 2000. It is common cause that the appellants did not take him to any police station.

[16] The first and third appellants testified that whilst they were in the deceased's house they deliberately did not disclose before other members of the deceased's household that they were seeking his assistance to find Mr Seboka, in order to prevent any one of them alerting the latter.

[17] After he departed and left the house with the appellants no member of the deceased's household or family heard from him or saw him alive again. As to what occurred after the deceased left his house we only have the version of the first and third appellants – the second appellant, Mr Felokwane Goqo, did not testify and the State presented no other evidence in this regard. According to those two appellants they questioned the deceased in the motor vehicle about Mr Seboka's whereabouts. In response he volunteered to help them locate Mr Seboka.

[18] According to the two appellants, the deceased first led them to a house in Atteridgeville. The deceased then noted that Seboka's vehicle was not there and consequently directed them to an address in Sebokeng. There, he alighted from the vehicle ostensibly to enable him to ascertain whether Seboka's vehicle was on the premises. Suddenly he fled. It was dark and they were unsuccessful in their pursuit of him. They did not see him alive again.

[19] The deceased's body was found on the N1 national highway near Sebokeng approximately 26 hours after he had left his house to accompany the three appellants.

[20] Makhafola AJ considered the events set out above and the testimony of the first and third appellants. He rejected their version of events as palpably false. He had regard to the improbabilities in their evidence and the contradictions between their evidence in court and written statements they had made.[2] He had

[2] Both the first and second appellants, in a written statement made on 24 May 2000 under the guidance of their attorney, said the following:
'3. On the morning of 22 May 2000 I was contacted by Henry Beukes to assist him in an investigation concerning the theft of R1,2000 000-00 at Putco.
4. I was requested to approach Sandy Botomane and Titus to question them about the said theft.'
This indicates a pre-planned interrogation of the deceased and Seboka and not a spontaneous decision to seek his assistance to find Seboka, lending a lie to their evidence in court. In

regard to entries in the personal diary of the first appellant, made some time after the events of the night on which they confronted the deceased, and considered that it contradicted evidence in court on behalf of the appellants in relation to events after the deceased had allegedly fled.

[21] The learned judge in the court below took into account that the third appellant, in the presence of witnesses, had falsely said that they were taking the deceased to the Atterridgeville police station. He reasoned that they had induced the deceased to go with them under false pretences, bringing him under the impression that he was being arrested and concluded that they were thus guilty of kidnapping him. He held it against the second appellant that he did not take the court into his confidence but chose rather not to testify. He rejected the alibi evidence proffered on behalf of the first appellant, that he had been on a police operation in Soweto during the night of 23 May 2000 into the early hours of the morning of 24 May 2000.

[22] Makhafola AJ was acutely aware of the fact that he was convicting the three appellants on the murder charge based on circumstantial evidence. After listing aspects of their evidence that he found unsatisfactory and rejecting the alibi evidence he concluded rather cryptically as follows:

'To my mind, circumstantially, the cumulative effect of these elements of proof is overwhelmingly unassailable and it establishes beyond a reasonable doubt the existence of the *corpus delicti* as well as the accuseds' actions in willfully and maliciously being its cause. In the totality of all the circumstances the accused are not excluded from having caused the death of the deceased. I find that the accused caused the death of the deceased.'

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admissions made in terms of section 220 of the Criminal Procedure Act 51 of 1977 Beukes admitted, inter alia, that he had, on the morning of 22 May 2000, instructed two policemen to confirm the addresses of Seboka and the deceased. It is clear from this that Beukes and subsequently the appellants had both Seboka and the deceased in their sights.

[23] It is common cause that multiple injuries caused the deceased's death. It is not in dispute that the deceased died somewhere between 23h00 on 23 May 2000 and 03h40 on 24 May 2000. More importantly, it is uncontested that the injuries sustained are consistent with those that might have been sustained in a hit-and-run collision as well as being consistent with the deceased being killed elsewhere and left injured or dead on the national highway.

[24] A further fact that does not appear to be in dispute is that the deceased had confided to his girlfriend, a week before his death, that his life was under threat. This was related to the illegal ticket machine found in his cubicle and to certain persons connected therewith, who had offered him R10 000 not to reveal their identities. According to Ms Motileng the deceased had told her that the machine found in his cubicle belonged to Mr Seboka.

[25] Mr Seboka testified that his car had been parked at his house in Atteridgeville on the night when he was being sought by the appellants and that it was visible from the street. The suggestion is that the police must be untruthful about the reason for seeking the deceased's assistance in locating Mr Seboka. Counsel for the appellants correctly submitted that Mr Seboka was an unimpressive and patently dishonest witness. His evidence on material aspects is unreliable. As stated above, it is clear from the statements they made with the assistance of their attorney that the appellants were looking to arrest Mr Seboka. This is substantiated by their visit to his parents' house. It is unlikely that they would have passed up the opportunity to arrest him at his house had he been there.

[26] In P J Schwikkard and S E Van der Merwe *Principles of Evidence* 3 ed (2009) at p 21 para 2 9 the following appears:

'Circumstantial evidence often forms an important component of the information furnished to the court. In these instances the court is required to draw inferences, because the witnesses have made no direct assertions with regard to the fact in issue. These inferences must comply with certain rules of logic.'

[27] Circumstantial evidence is described as follows in C W H Schmidt *Bewysreg* 4 ed (2000) at p 101:

'Omstandigheidsgetuienis is getuienis van 'n feit of feite waaruit 'n afleiding omtrent die primêre feite in geskil gemaak kan word.'

Later the following appears:

'By die uiteindelike beoordeling van 'n strafsaak, waar die bewyslas soos normaalweg die geval is, op die staat rus, kan 'n feit in geskil deur omstandigheidsgetuienis bewys word slegs indien (i) die afleiding wat die staat bepleit met al die bewese feite versoenbaar is en (ii) geen ander redelike afleiding uit daardie feite gemaak kan word nie.'

This, of course, is distilled from *R v Blom* 1939 AD 188 at 202-203 and are the rules of logic referred to in the preceding paragraph.[3]

[28] Having regard to the uncertainty concerning the cause of death and considering that there were threats against the deceased's life from other quarters and that the evidence in relation to what occurred after the deceased entered the police vehicle up until he allegedly fled is uncontested, and lastly that there is no evidence of any kind that there had been any contact between the deceased and the appellants in the intervening 26 hours, the conclusion reached by the court below in respect of the murder charge is unjustified. The conclusion is not in accordance with the rules of logic set out in *R v Blom*.

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[3] The following appears in *R v Blom*:
'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.'

[29] The criticisms by Makhafola AJ of the evidence on behalf of the appellants are largely justified. Their earlier written statements crafted under the guidance of their attorney contradict their evidence that the search for and the interrogation of the deceased was not premeditated. A consideration of the alibi evidence reveals that the conclusion reached by the court in this regard is justified. I do not intend to deal with the details thereof. However, it does not necessarily follow that their lies on these aspects warrant the conclusion reached by the court below.

[30] There might be suitable cases in which it is safe to conclude that lies, together with other acceptable evidence, prove the guilt of an accused. However, courts should be careful to decide against an accused merely as punishment for untruthful evidence. In *S v Mtsweni* 1985 (1) SA 590 (A) at 594E-F the following is stated:

'Voordat 'n skuldigbevinding aan moord kan geskied moet daar bewese feite wees wat by wyse van afleiding die appellant aan die dood van die oorledene koppel. By ontstentenis daarvan bestaan daar nie 'n *prima facie* saak teen die appellant nie, en kan sy leuenagtige getuienis, net soos in die geval waar hy nie getuig nie, nie die leemtes in die Staat se saak aanvul en 'n gevolgtrekking van skuld regverdig nie.'

[31] As indicated above the inference that the appellants caused the death of the deceased is not an inference that can be drawn in the face of the proved facts referred to in paras 23, 24 and 28. Consequently the conviction on the murder count cannot stand.

[32] I turn to deal with the kidnapping conviction. The offence is defined as the intentional unlawful deprivation of the liberty of a person.[4] Of course, if the deceased consented or volunteered to accompany the appellants a conviction would not be warranted.

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[4] *S v Levy* 1967 (1) SA 347 (W) at 353A-C and J R L Milton, *South African Criminal Law and Procedure* 3 ed (1996) Vol II at 544-545.

[33] After the appellants identified themselves as policemen they asked the deceased to come with them. After some debate with his girlfriend he told her that he thought it better to go with them because they were policemen. They did not effect an arrest.

[34] The policemen behaved coarsely and were overbearing when they encountered the deceased in his house for the first time. There is no countervailing evidence to the version presented by the appellants that, when the deceased was told they were looking for Mr Seboka he volunteered to help them locate the latter and that he subsequently fled. It cannot be said that their version on this aspect is not reasonably possibly true and it impacts on both the murder and kidnapping count. As indicated above, there is no evidence linking the deceased to the appellants during the day before his body was discovered. Once one accepts that the deceased volunteered to accompany the appellants as soon as he was told that they were looking for Mr Seboka, (moments after they had come out of his house), the kidnapping conviction cannot be sustained.

[35] In light of the conclusions set out above it is not necessary to deal with the sentences imposed by the court below.

[36] There are remaining aspects I intend to address. First, there is the question of the ‘well-known fact’ referred to in para 11 above, namely, that when a person is in detention he is more likely to co-operate and divulge information to the police.

[37] Mr Jasper Johannes Prinsloo, a former policeman, who at some stage was involved in the AIN investigation into the Putco theft, testified in the court

below about this. The following passages reflect what was put to him under cross-examination and his responses:

'Ek gaan aan u 'n stelling maak wat deur beskuldigde 1 in sy pleitverduideliking aan hierdie hof gemaak is. Dit is dat dit bekend is by ervare polisiebeamptes dat wanneer 'n persoon gearresteer is, as jy 'n lasbrief op hom kan kry en jy kan hom arresteer, is dit soveel makliker met die ondervraging want hy is meer geneig dan om sy samewerking te gee. Hy is uit sy omstandighede uit en makliker vertel hy jou wat het gebeur. --- My ervaring is dat dit korrek is, u edele, grotendeels vanweë die blote feit dat die verdagte dan ervaar of aanvaar dat daar *prima facie* getuienis teen hom moet bestaan aangesien 'n aanklaer en 'n landdros nie 'n lasbrief sal uitreik op spekulatiewe inligting nie.

Ek wil dit selfs 'n stappie verder neem. Wanneer 'n persoon 'n verdagte is en daar is 'n lasbrief op 'n ander saak teen hom, selfs daardie arrestasie op die ander saak waar die persoon dan in hegtenis geneem word, maak daardie persoon baie meer vatbaar om saam te werk met die polisie. Hy is uit sy natuurlike omgewing. --- Dit is korrek, u edele, dit is ook ondersoek taktiek wat veral gebruik word in die ondersoek van ingewikkelde komplekse sake waar die bewys van die saak baie moeilik is.

Ek wil vir u sê wat hier gebeur het en dan u kommentaar vra daaroor, daar was 'n persoon wat ons na verwys in die saak as Titus, Titus is een van die persone wat hier omkring was en dat u geglo het hy is betrokke. Dit is Titus Seboka. Daar is vasgestel dat daar op 'n ander aangeleentheid 'n lasbrief teen hom is. Daar is besluit om hom op daardie lasbrief te arresteer wat aan hulle dan die geleentheid sou gee om hierdie aanvaarde ondersoekmetode toe te pas en dan ook die ondervraging te doen op die Putco saak. --- U edele, ek vra die hof om verskoning, ek wil net seker maak ek verstaan die stelling korrek. Is die stelling van u advokaat Roux dat ek oor daardie inligting beskik het? . . .

Wat ek eintliik wil weet in die lig van die erkende ondersoekmetode, wat ek wil weet met u ervaring sou dit vir u 'n sinvolle wyse van optrede gewees het as daar nou 'n lasbrief teen een van die verdagtes uit is op 'n ander saak om daardie lasbrief uit te voer, juis omdat 'n persoon dan meer geneë is om met die waarheid vorendag te kom in daardie omstandighede? --- Ja . . . Sou dit vir u sinvol wees? --- Ja, u edele.'

[38] A former high-ranking officer in the SAPS, Mr Karel Johannes Britz, testified concerning this method. The following are the relevant passages from his evidence in the court below:

'Step into that same trap. Mnr Titus Seboka, dit was amper vir hulle *bingo* toe hulle weet daar is 'n lasbrief, want dit is 'n ou ondersoekmetode dat as jy 'n persoon op 'n lasbrief onverwant kan arresteer en hy is weg uit sy warmte van sy omgewing, dan is hy baie meer geneë om saam met die polisie te werk en te vertel wat gaan aan. --- U Edele, ja, u weet, die tipe ondersoeke wat ons gedoen het, as elke beskuldigde 'n lasbrief teen hom gehad het, maar dan sou ons duisende meer sake opgelos het. Maar ons het net 48 uur om 'n ou aan te hou sonder 'n lasbrief en dan moet jy hom óf aankla, óf laat loop. As 'n man wat van moord beskuldig word op A 'n lasbrief teen hom het vir 'n huisbraak op Brits en ons weet dit voor die tyd, dan vang ons hom op die huisbraak van Brits en ons hou hom aan en ons laat die borg opponeer en ons het 'n lang tyd om hom te ondervra.

Inteendeel, in hierdie saak doen hulle presies dieselfde. Hulle het vir Burger, en u weet daarvan, op 'n ander saak gearresteer met die uitsluitlike doel om hom in hierdie saak te ondervra. --- En aan my getuie …[tussenbei]

Hulle was oop daaroor en hom vir 20 dae aangehou en hy was onskuldig bevind. --- En om hom as getuie te maak teen hy en 'n klomp ander mense, dit is waar.

Ja. Saam met dit wil ek vir u sê dat die staat het getuienis aangebied dat mnr Seboka, Titus Seboka, wel by die werk was op 23 Mei 2000, mar ek wil dit vir u in konteks plaas met ondersoekmetodes. Ek wil dit aan u stel, u kan daarop antwoord dat dit baie selde is dat die polisie 'n persoon by sy werk sal gaan arresteer en daar is goeie redes daarvoor. Hulle is, hulle weet as hulle met daardie onverwagse laatnag, 04:00 die oggend kom, is daardie persoon soveel meer onverwags betrap en soveel meer samewerkend. --- U Edele, ja, ek sal vir u sê verskillende ondersoekers verskil van mekaar. Ons ouens wat Moord en Roof agtergrond het en wat goed onderleg is in ondervragingsmetodes, dis hoekom ons op Moord en Roof is, het nie maklik 'n ou by sy werk gaan vat waar almal sien, almal vra vrae, alles nie. Ons het uitgevind, ons het vir hoeveel dae 'n verdagte se huis dopgehou, dan sien ons hom in- en uitgaan, maar ons besluit dis nie nou reg om hom te vang nie. Dan doen ons dit nie.

Ek dink ook een van die redes, en die polisie sê dit nie altyd graag nie, as hulle hom daar – en on sweet van verdedigingskant – as hulle hom by daardie werk gaan haal voor die polisie ry, is die advokaat of die prokureur daar. --- Hulle wag vir jou by die aanklagkantoor, dis korrek.

Maar nie by sy huis so maklik 04:00 die oggend nie. --- Dis korrek. Die regsmense werk nie maklik in die nag nie, hulle kom eers die volgende oggend uit!'

[39] South Africa is not a police state. Section 36 of the Constitution is emphatic about the rights of arrested, detained and accused persons. These

rights are not to be flouted. The police methods described in the passages set out in the preceding paragraphs reflect an attitude reminiscent of the darker days of South Africa's history and has no place in our present democratic order. It should be dealt with decisively by the relevant authorities.

[40] The second issue concerns the undesirable fusion of private and police investigations. It appears from the evidence referred to earlier that AIN commanded the resources of the SAPS when it saw fit. The police officials involved readily complied. The SAPS is not up for privatisation, nor for direction by parties such as AIN. This too is a matter that should be dealt with by the relevant authorities.

[41] Lastly, it is not only that the lines between the AIN and police investigations became blurred, but, as set out above, police officials acted in two capacities, even going to the extent of doing AIN work whilst on police 'sick leave'. This is untenable and should be investigated by the relevant Ministry.

[42] In light of the conclusions set out earlier, the following order is made:

1. The appeal against both convictions is upheld and the convictions and related sentences are set aside.
2. The cross-appeal by the State against sentence is dismissed.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J G Cilliers SC
	Instructed by Adv J Cilliers Brooklyn Advocates Chambers Pretoria Truter, Crous & Wiggill Inc c/o Naudes Attorneys Bfn
For Respondent:	A J Fourie A P Wilsenach
	Instructed by Director of Public Prosecutions Pretoria Director of Public Prosecutions Bloemfontein