

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A499/2010

DATE:

26 NOVEMBER 2010

5 In the matter between:

SIYABULELA LUMIKA

Appellant

and

THE STATERespondent

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J U D G M E N T**BAARTMAN, J:**

On 19 August 2009, the regional magistrate at Wynberg
15 convicted the appellant on one count of murder and one count
of assault with intent to do grievous bodily harm. That court
sentenced the appellant to an effective 16 years direct
imprisonment, 15 years in respect of the murder charge and 3
years in respect of the assault charge, 2 of which were to run
20 concurrently with the sentence on the murder count. This is an
appeal against that conviction and sentence.

The circumstances that gave rise to the conviction, appear
from the record to be the following:

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The State's version:

The State's version of the events were as follows. Six years ago, Tomyika Kavese, the deceased, and Joseph Hadida, the complainant in respect of the assault charge ("the
5 complainant"), arrived in South Africa from Angola. They settled in Nyanga in the Western Cape. On the evening of 30 July 2007, the complainant was walking towards his house when he saw the deceased come out of his, that is the complainant's house, and the appellant and two others
10 attacked the deceased.

The complainant saw the appellant stab the deceased several times. When the complainant tried to intervene, the appellant, who was armed with a knife, said "here is Joseph", (referring
15 to the complainant) and chased the complainant until he fell on the road, at which point a scuffle broke out between the two, in which process the appellant stabbed the complainant in the knee and chest. The appellant raised the alarm, which caused Nathaniel Jacob, a neighbour, to investigate. Jacob found the
20 appellant and the complainant in a scuffle with a knife lying close to them. Members of the community arrived on the scene and assaulted the appellant to the extent that he needed medical attention.

25 The deceased died at the scene. Later that same evening, the

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police removed the deceased's body from the scene. The complainant testified and said that although the area where the deceased was attacked was poorly lit, it was sufficient for him to have identified the appellant as the perpetrator. Inspector
5 Prinsloo (Prinsloo), the investigating officer, who attended the scene on the night of the incident, corroborated the complainant in respect of the available light in the area. The Court called Prinsloo, who said that:

10 "Dit is 'n plakkersgemeenskap wat daar woon. Aan die oorkant van die pad is huise. Daar is 'n groot *floodlight* wat jy gewoonlik in die *townships* in kry. Ek het die toneel daai aand bygewoon en daar was redelik lig gewees daardie aand. Waar die
15 oorledene gelê het is tussen - is so 'n klein gapinkie tussen die hokkies. So as jy verbygestap het, sou jy hom nie kon sien lê nie. (Die area waar die oorledene gelê het was...so inhamme van, spasio van omtrent 'n meter...As die oorledene moes
20 gestaan het - die plek waar die oorledene gelê het, is omtrent 'n meter tussen twee plakkershutte. Al staan hy daar, as jy verby hom geloop het, dan sou jy hom nie gesien het nie. Al die aanduidings is dat hy voor, nie in die stegie nie, maar voor die stegie
25 gestee was. Die bloed het 'n ent van die ingang af,

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was daar ook bloedspatsels wat verder af in die pad
geloop het. Daai gedeelte is belig, dit is in die pad,
so om te sê in die hoofpad waar jy deur ry."

5 That is a summary of what his evidence is in that respect.

The appellant's version:

The appellant testified and said that he was walking with his
girlfriend towards his house when a group confronted and
10 accused him of having killed someone. Members of that group
assaulted him. The complainant, who was armed with a
firearm which he pointed at the appellant, was in the group.
The appellant denied that he had assaulted the complainant or
the deceased. The appellant's girlfriend testified in an attempt
15 to corroborate his versions.

Identification was in dispute:

It is so that identification is in dispute in this matter. The
court *a quo* found that the State had proved the appellant's
20 identity. In the matter of S v Mthetwa 1972 (3) SA 766 (A) at
768A-G, Holmes, JA said the following about identification:

"...because of the fallibility of human observation,
evidence of identification is approached by the
25 Court with some caution. It is not enough for the

identifying witness to be honest, the reliability of his observation must also be tested. This depends on various factors such as lighting, visibility and eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait and dress, the result of its identification parades, if any, and, of course, the evidence by and on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against another in the light of the totality of the evidence and the probabilities. See cases such as R v Masemang 1950 (2) SA 488 AD and R v Dladla & Others 1962 (1) SA 307 (AD) at 301C and R v Mehlape 1963 (2) SA 29 (D)."

The trial court was satisfied that the circumstances were such that the complainant could have reliably identified the appellant. The court *a quo* relied on Prinsloo's evidence.

The approach on appeal:

In considering the various grounds of appeal, it should first be

noted that it is a well accepted principle that a court of appeal will not likely interfere with the credibility findings of the trial court, since the court "sees and hears the witness in person, is steeped in the atmosphere of the trial and is furthermore in an advantages position to observe their demeanour, but also their appearance and whole personality". See Rex v Dhlumwayo & Another 1948 (2) SA 677 (A) at 705, paragraph 3. However, the court of appeal should be alert to the warning sounded by Nugent, J in the matter of S v Marx 2009 (4) (SCA) 123 at para 6:

"I do not think we ought simply to defer to the trial court's findings, notwithstanding the care with which they were arrived at. This court has cautioned on more than one occasion, most recently in Medscheme Holdings (Pty) Ltd v Bhamjee against according undue weight to the advantages that are said to be enjoyed by a trial court and has said that the demeanour of a witness is no substitute for evaluating the content of the evidence, taking into account the wider probabilities."

The Court must assess the evidence as a whole. This approach was set out as follows in the matter of S v Van der Meyden 1999 (1) SACR 477 (W) at 499i, 450a-b:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning, which is appropriate to the application of that test, in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached, (whether it be to convict or acquit), must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable and some might be found to be only possibly false or unreliable, but none of it may simply be ignored.”

Grounds of Appeal:

The appellant's counsel submitted that the identity of the deceased's killer was in dispute. Counsel criticised the court *a quo* for placing the reliance that it did on Prinsloo's evidence. Having regard to the totality of the evidence, I cannot fault the magistrate's acceptance of Prinsloo's evidence. The complainant said that he saw the deceased as he came out of the complainant's house, where the appellant and two others accosted him. The appellant had a knife with

which he stabbed the deceased and when the complainant intervened, the appellant chased him and caught up with him where they struggled until Jacob intervened. Jacob confirmed the scuffle between the appellant and the complainant. It follows that part of the scene must have had adequate light, at least, for the complainant to have seen the attack on the deceased.

However, that is not the end of the inquiry, for if the appellant's version is reasonably possibly true, he is entitled to an acquittal. The appellant would have the Court believe that he was walking in the middle of the road with his girlfriend when he was accused of having killed someone and that his accusers assaulted him. A case of mistaken identity.

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The appellant's girlfriend confirmed that they were walking along the road when she saw approximately 10 men approach them and start to assault the appellant. She did not see the firearm. I cannot fault the Court's rejecting of that version in the light of the totality of the evidence presented to the Court. I am satisfied that the court *a quo* correctly found that the State had proved beyond reasonable doubt that the appellant was the person who assaulted the deceased and also the complainant.

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Regarding sentence:

As indicated above, the Court sentenced the appellant to an effective 16 years direct imprisonment. The appellant's counsel submitted that that sentence was shockingly
5 inappropriate. The accused's personal circumstances appear from the record to be the following. He was a 22 year old first offender. The appellant had completed Grade 11 at school and was employed and earned R500,00 per week. The community assaulted the appellant on the night of the incident.
10 It is so that the provisions of section 51 of Act 105 of 1997, the Criminal Law Amendment Act, was applicable to the murder count.

The Court was of the view that in the circumstances of this
15 matter, there were no substantial and compelling circumstances justifying imposing a lesser sentence than the prescribed minimum. In S v Vilakazi 2009 (1) SACR 551 at 562F, para 20, Nugent, JA put the position as follows:

20 "I have pointed out that the essence of the decisions in Malgas and Dodo, is that a court is not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence. Whether a sentence is proportionate,
25 cannot be determined in the abstract, but only upon

a consideration of all material circumstances of the particular case. Although bearing in mind what the legislature has ordained and the other strictures referred to in Malgas. It was also pointed out in

5 Malgas that a prescribed minimum sentence need not be 'shockingly unjust' before it is departed from, for '(o)ne does not calibrate injustices in a court of law'. It is enough for the sentence to be departed from that it would be unjust to impose it."

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Having regard to the circumstances of this matter, I am of the view that the sentence imposed by the Court is not unjust and does not warrant interference. Therefore, I make the following order. The appeal against conviction and sentence is

15 dismissed.



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BAARTMAN, J

MIA, AJ: I agree.



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MIA, AJ