



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: A733/2009

DATE: 15/9/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED. ✓

09-09-2010
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IN THE MATTER BETWEEN

SELLO RAMABOKELA

1ST APPELLANT

HENDRICK MAKGOTA

2ND APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

BAM, AJ

- [1] From the outset it has to be recorded that the court *a quo* granted the appellants leave to appeal against the convictions but refused leave to appeal against the sentences.

[1] The appellants have in the meantime addressed a petition to the Judge-President of this division for leave to appeal against the sentences as well. The petition was successful and leave was granted.

[2] The appeal against the convictions and sentences will accordingly be dealt with simultaneously.

[4] The appellants were convicted in the regional court, Pretoria, on three counts of kidnapping (counts 4, 6 and 8), two counts of assault with the intent to do grievous bodily harm (counts 11 and 13) and one count of culpable homicide (count 14). On 13 May 2009 the appellants were sentenced as follows:
counts 4, 6 and 8 taken together for sentence purposes: one year imprisonment;
counts 11 and 13 taken together for sentence purposes: one year imprisonment;
count 14: six years imprisonment.

In toto each of the appellants have to serve eight years imprisonment.

[5] The charges resulted from incidents which occurred during a strike by Tshwane municipal workers at the end of January beginning of February 2005.

[6] The municipal workers went on a strike resulting in the municipality employing independent subcontractors to remove refuse from certain parts of the city. The

strikers were, however, discontent with this arrangement and started attacking the subcontractors.

- [7] During the morning of 1 February 2005 the strikers kidnapped, assaulted and generally abused some of the subcontractors. One of the subcontractors died as a result of a "heart fracture" ("hart fraktuur") according to the post mortem report. The deceased also sustained multiple injuries all over his body caused by "blunt" instruments.
- [8] The mob of strikers consisted of $\pm$ 600 individuals, and accordingly, what is not strange, the identity of the strikers involved in the assaults, is of concern to the State.
- [9] The two appellants were arrested by the police upon information that they were actively involved in the assaults referred to above.
- [10] Samuel Mahlangu, complainant pertaining to counts 1 (kidnapping) and count 4 (assault to do grievous bodily harm) testified that he was kidnapped and assaulted and taken to a place where he was further assaulted, his clothes were torn from his body and water was poured on him.
- [11] According to this witness he knew two of the assailants personally in that he had been working with them for six months. One he knew by name and the other one

from having seen him on a daily basis. He substantiated his evidence by pointing out the two appellants in the dock. He told the court that the first appellant was armed with a screwdriver and second appellant with a knife. The two appellants played an active role in his kidnapping and assault. During his evidence he corrected himself and testified that the knife was actually in possession of the first appellant and the screwdriver in possession of the second appellant.

- [12] The witness described in detail how the two appellants and other members of the striking group hit and kicked him. He further testified that his clothes, as well as the clothes of some of the other subcontractors, were torn from their bodies and how they were generally abused by the strikers. He also testified that the two appellants were actively involved in the assault on the deceased. The deceased was being kicked, jumped upon and trampled by members of the group. Although the first appellant aimed a blow with the knife at the deceased the deceased was not struck. This witness attended to the deceased but the deceased died at the scene.
- [13] Dr Rossouw, the pathologist examining the body of the deceased, found the cause of death to be as recorded above. The body had no knife or other wounds caused by a sharp object.
- [14] The witness Thomas Ramasodi (complainant count six) who was in the company of the first witness Mr Mahlangu, corroborated the evidence of Mahlangu.

Although he did not know the appellants beforehand he pointed them out in court in what is called a "dock identification".

- [15] Mr Rautenbach SC, for the appellants, criticised the court *a quo* for having admitted the evidence of Thomas Ramasodi. This was Mr Rautenbach's point of departure. In developing his argument he leveled severe criticism against the so-called dock identification procedure, more specifically in this matter the identification by Ramasodi. He argued that Ramasodi was totally unreliable and untruthful and the court *a quo* misdirected itself to accept the evidence of this witness. One of the reasons advanced by Mr Rautenbach why Ramasodi's evidence should not have been accepted is the fact that Ramasodi and Mahlangu talked about the case, outside the court before the case started.

- [16] Mr Rautenbach endeavoured to persuade us that the evidence of Ramasodi should have been totally ignored by the court *a quo*. Mr. Rautenbach SC, who appeared for the appellants in the regional court, submitted that Ramasodi's evidence was totally contaminated by the dock identification.

In this regard Mr Rautenbach further pointed out that the court *a quo* should have rejected the evidence of Ramasodi and that the court then should have dealt with the evidence of Mahlangu as that of a single witness. The learned regional magistrate, in his judgment, clearly indicated that Ramasodi's evidence was not of

the same quality as that of Mahlangu. However, the magistrate in his judgment found that both witnesses impressed him as being both truthful and reliable.

[17] Mr Rautenbach specifically pointed out that the dock identification by Ramasodi lacks credibility. In this regard it was submitted that the said pointing out should have the same evidential value as the answer to a leading question, which is no value at all. In this regard I was referred to the case of *S v Moti* 1998(2) SACR 257 (SCA) at 257H where the Supreme Court of Appeal held that identification of an accused in the dock is suspect *per se*;

- and *S v Maradu* 1994(2) SACR 210 (W) at 413J-414A Bliden, J held as follows:

"To my mind the danger of a dock identification is the same as that created by a leading question in examination in chief. It suggests the answer desired. As the latter type of question is inadmissible I see no reason why dock identification should also not be inadmissible save in certain special circumstances."

- and *S v Daba* 1996(1) SACR 243 (E) Kroon, J made the following remarks pertaining to the identification in the dock by a witness:

"... if it has been no more than a dock identification, then for reasons stated in Maradu's case, that identification should carry no weight."

[18] From *Maradu's* case *supra* it appears that the learned judge did not as in *Daba's* case, draw a line through dock identification. In the former case it was with respect foreseen by the learned judge that circumstances may exist where dock identification could be admissible. I humbly agree.

[19] It is trite that evidence of identification should be treated with caution. Much has been said about this issue in the past. Our courts however deem it necessary to, from time to time, repeat the law in this regard. See *S v Mhetwa* 1972 (3) SA 766 (A) where the following was laid down:

"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of its observation must also be tested."

See also *S v Carolus* 2008 (2) SACR 217 SCA.

[20] Experience has taught that prosecuting counsel/prosecutors will take precautions not to bluntly draw a witness' attention to the person(s) in the dock. A proper basis for adducing such evidence should be laid: for instance to ask a witness how he would describe the suspect, by what features if any he would recognise him, what the circumstances were when he saw the suspect, what elumination there was, etc.

[21] It may also be true that dock identification may never carry the same weight as evidence of identification emanating from a proper and formal identification parade. However, I am not convinced that dock identification should be equated with an answer to a leading question. To my mind it should be evaluated in the same manner all evidence regarding identification is evaluated – with caution, nothing more, nothing less.

In *S v Tandwa* 2008 (1) SACR 613 SCA at 652 [129]g the Court said the following:

"Dock identification ... may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification it carries little weight." (My underlining.)

The latter part of the quoted remark, with respect, indicates that the weight to be attached to dock identification depends on the circumstances of the case which may differ from case to case.

[22] To admit evidence of dock identification does not mean that it will, at the end of the case, necessarily carry adequate evidential proof of identity. It would still depend on the evaluation of the evidence after having applied the usual cautionary rule and after having considered the totality of evidence.

[22] In passing, it is not strange that evidence of identification emanating from a formal identification parade does in any event, not mean *per se* that it could not be rejected at the end of the case. It is not uncommon that positive identification evidence from a formal identification parade had been rejected as a result of some or other irregular interference by individuals influencing witnesses by *inter alia* the showing of photographs of the suspects, before the parade, to prospective attendants.

[23] The evidence of the witness Mahlangu calls for a somewhat different approach as he knew the two appellants beforehand. He was criticised by Mr Rautenbach on the basis that he was untruthful and unreliable. Mr Rautenbach advanced several reasons for this submission. It included the contention that this witness initially lied when he said that the first appellant had the screwdriver in his hand and the second appellant the knife. Later on the witness corrected himself by saying that the two objects should change hands, first appellant had the knife and second appellant the screwdriver. Mr Rautenbach relied heavily on this "lie" for his contention that the witness was untruthful. Mr Rautenbach again also referred to the concession that the two witnesses discussed the case before they gave evidence.

- I considered the arguments of counsel in this regard and I am satisfied that the magistrate was correct in **finding that** both witnesses were honest and reliable. The alleged "contradiction" is nothing more but a correction of the witness' own evidence which does not amount to a contradiction as

suggested by Mr Rautenbach. In this regard Mr Roberts for the respondent pointed out that in any event the two objects did not play a role at all in the assaults or the death of the deceased. There was no evidence that anybody sustained an injury caused by any of the two weapons, and there was no reason to lie about possession of the weapons.

- The mere fact that Mahlangu knew the appellants beforehand would render the holding of a formal identification parade, for obvious reasons, of no value at all.
- Regarding the discussion of the case by the two witnesses I am of the opinion that it proves nothing. There was no suggestion even that they tried to influence each other. The dock identification of the appellants by Mahlangu in the circumstances should be held to be admissible on the same basis as that of Ramasodi. Again the evidential value of the dock identification is something to be considered upon the due applying of the cautionary rule regarding identification as discussed above.

[24] Mr Rautenbach further submitted that many grounds exist upon which the reliability of an identification witness can be criticised. I agree with this submission, however as stated before, hence the cautionary rule to be applied before such evidence should be found to have sufficient evidential value.

[26] The learned regional court magistrate relied heavily upon the evidence of Mr Mahlangu for the positive identification of the appellants. In this regard the

learned regional court magistrate was satisfied that Mr Mahlangu was both reliable and honest regarding the aforesaid identification. From the judgment it appears that the magistrate at all relevant stages kept in mind all the criticism that could be levelled against the evidence of Mahlangu and Ramasodi including the more specific reference to the "dock identification."

[27] I have considered the submissions made by counsel as well as the regional court's decision pertaining to the acceptance of the evidence of identification of Mahlangu and Ramasodi. I could find no reason to say that the learned regional court magistrate has misdirected himself or erred in any material respect.

- The magistrate clearly took into consideration the totality of the evidence pertaining to the identification of the two appellants. To my mind Ramasodi's evidence corroborated the evidence of Mahlangu regarding the identification of the two appellants.

[28] The evidence of the said two witnesses proved beyond reasonable doubt that the two appellants were actively involved as alleged by the State. I have come to this conclusion after having considered the totality of the evidence including the issues referred to hereafter.

It was further contended on behalf of the appellants that the regional court magistrate should have found that their version, consisting of virtually a complete

denial of the evidence regarding their involvement in the alleged crimes, should be at least reasonably and possibly true.

- In this regard I was referred to *S v Munyai* 1986 (4) SA 712 (V) at 715 where VAN DER SPUY, AJ stated the following regarding the state's *onus* as far as the version of an accused is concerned:

"In other words, even if the state case stood as a complete acceptable and unshakened edifice, the court must investigate the defence case with the view to discern whether it is demonstrably false or inheritably so improbable to be rejected as false. There is no rule for balancing the two versions, it is the state's case as against the accused's case and to act on preponderances. That is clear from the next case to which Mr Bursey refers namely S v Singh (supra), in which their Lordships held that:

'In criminal cases, where there is conflict between the evidence of the state witnesses and that of the accused, it would be quite impermissible to approach the case on the basis that, because the court is satisfied as to the reliability of the state witnesses, it therefore must reject the accused's evidence. It was held that a proper approach in such case is for the court to apply its mind not only to the merits and demerits of the state's case that depends on the witnesses but also to the probabilities of the case. It is only after applying its mind to such probabilities that the court would be justified in reaching a conclusion as to whether the guilt of the

accused had been established beyond all reasonable doubt." (My underlining.)

- From the above authority it appears that even in the event of the court being satisfied that the state's case "stood as a complete acceptable and unshaken edifice" the court must still investigate the defence's case to determine whether it is not reasonably and possibly true.
- Such an approach, to my mind, in view of what follows hereunder, is clearly wrong. See *S v Trainor* 2003(1) SACR 35 (SCA) at 40 par [6] where NAVSA, JA in referring to the following passage in the judgment of the magistrate in that matter:

"Even though I have accepted the complainant's evidence, the court must still look at the accused's version and if the accused's evidence is reasonably possibly true, even though I do not accept it, even though I find that he is lying in certain instances, as the rules of the High Court ... have put down, then I am bound to accept that version, there should be a doubt in my mind, and the benefit of the doubt will then go to the accused."

remarked as follows in par [8]f-g:

"The passage from the magistrate's judgment quoted in par [6] demonstrates a misconception of how evidence is to be evaluated. In *S v Van Aswegen* 2001(2) SACR 97 (SCA) CAMERON, JA (at 101a-e), after observing that this misconception has its origins in cases like *S v Kubeka* 1982 (1) SA 534 (W) at 537F-G and *S v*

Munyai 1986 (4) SA 712 (V) at 715G, referred with approval to S v Van Tellinghen 1992(2) SACR 104 (C) at 106a-h and S v Van der Meyden 1999(1) SACR 447 (W) at 449h-450b. In the latter case NUGENT, J. with reference to the dictum in the Kubeka case, said the following (at 449h-450b):

'It is difficult to see how a defence can possibly be true if at the same time the state's case with which it is irreconcilable is "completely acceptable and unshaken"'. The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. ..." (My underlining.)

In *S v Chabalala* 2003(1) SACR 134 (SCA) at 139 par [15] HEHER, AJA with reference to *S v Van Aswegen* 2001(2) SACR 97 (SCA) said the following:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent

strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

- In view of the guidelines in the abovementioned decisions regarding the facts *in casu* it can be safely stated that once the state has proved the commission of the alleged crimes and the court has accepted the identification evidence adduced by the state, after having considered the totality of the evidence, there is no room for a finding that the appellants' version of non-involvement, can be reasonably and possibly true.

[29] When the totality of the evidence is considered I am satisfied that the learned regional court magistrate was correct in his finding that, regarding the crux of the matter, the state has proved the identity of the appellants beyond reasonable doubt. The state further adduced adequate evidence to prove, as was found by the court *a quo*, that the appellants in fact committed the crimes of kidnapping, counts 4, 6 and 8; – assault with the intent to do grievous bodily harm; and count 14 – culpable homicide – count 14.

- The state adduced sufficient evidence to prove that the appellants in fact committed kidnapping in that the witnesses concerned were forcibly put under control and removed from point A to point B. It is further clear that the evidence proved beyond reasonable doubt that the appellants and other members of the crowd, committed assault with the intent to do grievous

bodily harm. There can be no question that the mob, including the two appellants, if not co-perpetrators then at least aiders and abettors, with a common intent assaulted the complainants with the intention to do them serious bodily harm.

- Culpable homicide is a competent verdict on a charge of murder. The magistrate found that he was not convinced that the appellants had *dolus directus* to kill the deceased. The learned regional court magistrate referred to the matters of *S v Tenqwa* 1970 (3) SA 529 (SCA) *Amagmud v Jansen van Rensburg* 1993(1) SACR 67 (SCA) and *S v Nkombesi* 1972 (3) SA 476 (AD) at 478 as well as *S v Ngwenya* 1985 (2) SA 560 (SCA). The learned magistrate was clearly aware of the principles pertaining to common purpose, and *mens rea* regarding the question of culpable homicide in matters as *in casu*. I have no doubt in my mind that the learned regional court magistrate correctly applied the law to the facts in convicting the appellants of culpable homicide.

[30] Accordingly I am of the opinion that the appeal against the convictions should not succeed and that the convictions of the appellants pertaining to the six counts referred to above should be confirmed.

Ad sentence

[31] This court has limited powers to interfere with a sentence imposed by the court *a quo*. It has to be established that the court *a quo* misdirected itself or erred in

one or other material respect or imposed a sentence that is so improper and severe that it causes a sense of shock. See in this regard *S v Pieters* 1987 (3) SA 717 (A); *S v Roberts* 2000(2) SACR 522 (SCA); *S v Sadler* 2000(1) SACR 331 (SCA) and *Michele & Another v S* [2010] (1) All SA 446 (SCA).

[32] Public order is of main concern to the community and the government. No citizen should be subjected to disorder and violence when somebody else decides to strike, whether it is a legitimate strike or an unlawful strike does not matter.

[33] The behaviour of the appellants on that day cannot be tolerated in view of the resulting kidnapping, serious assault and death of a human being.

[34] The learned magistrate, in considering the sentence, took into account the abovementioned issues as well as other relevant and material aspects which usually play a role in the consideration of sentence.

[35] It is clear that the magistrate also considered other sentence options excluding a direct prison sentence.

[36] Sentence, as remarked by the magistrate, is one of the most difficult judicial exercises that can be undertaken by a judicial officer.

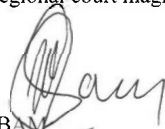
In deliberating whether the sentence imposed by the regional court magistrate was in fact appropriate and not a result of a misdirection or error by the learned regional court magistrate, I am of the opinion that the following aspects are also of importance

- (1) the appellants are first offenders;
- (2) the appellants have family lives and families to look after;
- (3) the appellants were gainfully employed on the day of the incident;
- (4) the appellants are respectively 29 and 36 years of age;
- (5) both were armed respectively with a knife and a screwdriver although there was no evidence that the weapons were in fact used upon any of the complainants or the deceased;
- (6) the strikers, including the appellants, were on the probabilities incited to strike – it appears that the strike was initially a lawful strike but later got out of hand;
- (7) it goes without saying that the emotions ran high on that day and in the circumstances there was very little to do to control the mob;
- (8) The fact that a human being died is *per se* very serious.
- (9) Innocent breadwinners were the targets of the unruly members of the mob of strikers;
- (10) The violence was uncontrolled, vicious and unprovoked.
- (11) Some of the victims sustained serious injuries and were hospitalised.

[38] Mr Rautenbach SC submitted that the fact that the municipal workers participated in the legal strike should have a mitigating effect on the sentence. I do not agree. No strike, whether it be legal or not, should have violence involved. The strikers should have kept that in mind. Unfortunately the appellants did not.

[39] I could find no reason to interfere with the court *a quo*. There was no misdirection and the sentence is appropriate.

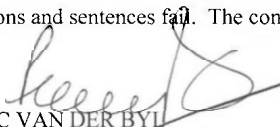
Accordingly I would suggest that the appeal against the sentence should also fail and the sentence imposed by the learned regional court magistrate confirmed.



A J B A

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I concur. The appeal against both the convictions and sentences fail. The conviction and the sentences imposed are confirmed.



PC VAN DER BYL

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

A733-2009

HEARD ON:

FOR THE APPELLANT: ADV J G RAUTENBACH SC

INSTRUCTED BY: FRIEDLAND HART SOLOMON & NICHOLSON

FOR THE RESPONDENT: ADV F C ROBERTS

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA