IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION - BHISHO

CASE NO. : CA& R 19, 20, 21 & 22/2016

Heard on : 24 June 2019

Date delivered: 17 September 2019

In the matter between:

XOLANI MKOLO	First Appellant
VUYOLWETHU ZINGO	Second Appellant
JONGIKHAYA MKOLO	Third Appellant
SINAYE MBONGO	Fourth Appellant

And

THE STATE	Respondent

JUDGMENT

MAJIKI J

[1] The four appellants faced charges of murder in the regional court in Zwelitsha. Initially they were five but the fifth one was discharged at the end of the state case. The provisions of section 51(1) of Act 105 of 1977 (the Minimum Sentence's Act) were invoked by the state in the event that they were convicted on that charge. They pleaded not guilty to the said charge without disclosing the

basis of their defence. They were found guilty as charged and each sentenced to undergo eighteen (18) years imprisonment. With the leave of the court *a quo* they now appeal against both conviction and sentence.

[2] The grounds of appeal are summarily;

- that the magistrate erred in finding that the state had proved the appellants' guilt beyond reasonable doubt;
- that the magistrate erred in rejecting the evidence of the appellants that they did not participate in the assault of the deceased but he was attacked by members of the community;
- that he erred in finding that the appellants' evidence was false and not satisfactory in all material respect;
- that he erred in not taking into account the evidence of the chairperson of the community of Cwengcwe, Wanini Panama (Panama) that the appellants did not participate in the assault of the deceased, they were just standing by trying to stop the crowd from assaulting the deceased when he was being assaulted by the members of the community;
- that the magistrate over emphasized the seriousness of the offence and interest of the community over the appellants' personal circumstances;
- that the sentence lacks the concept of mercy and indicates overemphasis on retribution;
- the magistrate failed to take into account that there is a likelihood that the appellant may still be rehabilitated; and
- that the sentence imposed is startlingly inappropriate and induces a sense of shock.

[3] It is common cause that the deceased was severely assaulted and subsequently died of multiple injuries. On the day of the assault, in the early hours of 3 July 2014, the deceased was with Thulani Tokwe, (Thulani) Sipho Tshiki, (Sipho) and Nosithembele Harry (Nosithembele) (the first three state

witnesses) at Thulani and Siphos' homestead. The appellants arrived at the said home, they enquired where the deceased was from and about a machine. The reference to the machine was in respect of a grass cutter, which apparently was stolen in a break-in at Xolani and Jongikhaya Mkolo's homestead. The appellants were in pursuit of the suspect. Subsequently, they went away with the deceased.

[4] It is in dispute that the appellants had weapons and that they assaulted the deceased.

[5] I will be referring to the appellants according to their names hereunder. The proceedings in the court *a quo* did not consistently follow the numbering as outlined in the charge sheet. Also, the judgment of the court *a quo* has the same challenge.

[6] According to the first three state witnesses, the appellants entered the homestead, where they found the deceased with Thulani, Sipho, Nosithembele and one Sinovuyo. Upon enquiry, the deceased told them he was from Gaza locality. He had not responded to the next enquiry about where the machine was, when the appellants assaulted him with spades and sticks. The then accused number 2 (Vuyolwethu) entered the room following the first and third appellants after the then accused numbers 1 (Xolani) and 3 (Jongikhaya). Vuyolwethu hacked the deceased first, with a spade. Then Xolani, Vuyolwethu, Sinaye went to the deceased and hit him with sticks and spades. Sipho specifically testified that also hit the deceased with a spade. The owner of the homestead was alerted by the noise from her room, in another structure within the homestead. She came to the room where the assault was taking place. She found the appellants but when she entered they did not continue to assault the deceased. She asked them not to attack the deceased at her home. The appellants held the deceased and left with him. The deceased was protesting, shaking his body. The appellants forced him by assaulting and pulling him. Nosithembele and Sinovuyo were also instructed by the appellants to go with the appellants. The appellants accused them of knowing the whereabouts of the machine and were told they would have to point out where it was. Thulani

had already ran away. He did have a view of the appellants from where he stood in the street. He conceded that when the appellants were walking with the deceased, they were confronted by five men. However, he never saw those men assaulting the deceased.

[7] The evidence reveals that when they were next to Vuyolwethu's home, the appellants assaulted the deceased again. By this time the deceased was weak and he was on the ground. In the morning, after day break, the community members arrived and they also assaulted the deceased with sticks. The appellants were present but they were no longer assaulting the deceased at this stage. The police were called.

[8] According to the fourth state witness, Sergeant Mangxola the appellants reported to him that they assaulted the deceased with sticks. They found him hiding at a certain homestead after he had committed robbery at the first appellant's home. He found the deceased lying in the street. There were angry community members on the scene. According to him, by the time he arrived the deceased appeared to have passed away for sometime.

[9] The appellants' version is that they only took the deceased with a view of taking him to the police. The appellants suspected him of having committed robbery. Whilst walking with him, five men approached and forcefully took the deceased from the appellants. The members of the community joined the five men. Those people assaulted the deceased with sticks. The appellants never assaulted the deceased at any stage that day. They did not carry weapons. There was no bad blood between them and the three state witnesses who implicated them.

[10] Panama who is referred to as the chairperson in the locality testified for the defence. His evidence was that on the day in question, around 03h30 in the morning, he was awakened by noise. He went to the scene where the deceased was. He found community members. He enquired from Xolani as to what was happening. Xolani said they got a thief, the thief was then being attacked. The appellants were standing by and not assaulting the deceased.

When the police arrived, the deceased was still alive. He succumbed to his injuries in the police officer's presence. The deceased's body was swollen and he had blood in his head. Upon being shown photos of the deceased's injuries on the exhibited photo album, he said he saw the open wound but did not know its depth.

[11] The issue for the appeal is whether the court *a quo* misdirected itself in finding that the appellants assaulted and stabbed the deceased resulting in the injuries which led to his death. Further, whether the sentence of eighteen (18) years imprisonment is appropriate in the circumstances of this case.

[12] The court *a quo* rejected the version of the appellants and found the assertions that they were unarmed as extremely ridiculous, in the circumstances of this case. The magistrate went on to state that, it would have been better if the court had to deal with the appellants who said they acted out of rage, believing that the deceased was the suspect in the housebreaking.

[13] The magistrate rejected the evidence of the defence witness, Mr Panama as an attempt to mislead the court. He said how Panama described the injuries on the deceased's head is not consistent with the injuries depicted in the exhibited photos. The witness said he saw blood in deceased's head, but according to the magistrate the photos showed a ravaged man. The deceased had open wounds. According to the post-mortem report, he had "fissured fracture across occipital bone at the back of the head, bruised abrasions on the forehead, left chick and chin," amongst his injuries.

[14] The magistrate summarised how the assault started, how it progressed and which of the appellants did what in the course of the assault. Worth mentioning is the fact that Thulani described the assault as a sustained attack which shocked him. He watched the severe attack on the deceased. Of the appellants, two had spades, one had a sword and another had a stick. When he was leaving in order to call elders, Jongikhaya assaulted him by slapping him in his face. Thulani is the only one who did not witness the whole events that led to the deceased's death. The magistrate accepted this evidence.

[15] In **S** v **Hadebe** 1997 (2) SACR (SCA) 641 at 645 the approach of an appeal court to findings of fact of a trial court was summarised as follows:

> "…in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

This confirmed the approach adopted in **S** v **Francis** 1991 (1) SACR 198 (A) at 198-199 that:

> "The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage with a trial Court has in seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

[16] In the court *a quo* an argument was raised that there was inconsistency in the evidence of the state witnesses with regard to whether Jongikhaya hit the deceased with a sword. This is based on the fact that only Sipho so testified, in his description of the attack by the appellants on the deceased. In my view, whether this was indeed an inconsistency, it would not affect the gist of the testimony of the state witness. They all testified the four appellants assaulted the deceased with dangerous weapons. They mentioned spades and sticks. What would be material is that Jongikhaya did deliver a blow which was part of the continued fatal assault on the deceased. When I deal with requirements for

common purpose it will be shown that Jongikhaya's blow was part of the assault that led to the death of the deceased.

[17] Further, reliance was sought to be placed on the submission that the magistrate ought to have accepted the evidence of Panama, that the appellants were standing by and did not assault the deceased. During the hearing, Mr Erasmus, who appeared for the appellants, correctly conceded that the magistrate's findings in accepting the evidence of the state witnesses and rejecting that of the appellants and their witness was correct.

[18] I also find no basis to faulter the magistrate's findings in that regard. The evidence by state witnesses is that sustained assault on the deceased took place at the witness' homestead, it continued outside until daybreak. Panama only arrived in the morning. How he described what he saw in deceased's body is inconsistent with proven injuries. The magistrate found, correctly so, that the evidence of the state witnesses corroborated each other in material respects. I have no basis to find that he misdirected himself in any manner. In my view, he was also correct in rejecting the appellant's evidence as improbable in the circumstances. This is particularly in relation to them stating that they pursued a perceived thief peacefully, took him out in the middle of the night, tried to defend him when five men were forcefully taking him. Later, they watched him being assaulted with sticks. Despite that, his injuries in the end are said to include open wounds consistent with the manner the state witness described the assault by the appellants on the deceased.

[19] As regards sentence, the state had invoked the provisions of the Minimum Sentences Act. The prosecutor when putting the charge stated that the state invoked the provisions of the Act because "the murder was planned or premeditated and all accused acted in furtherance of common purpose". The magistrate found the appellants guilty as charged. In my view, there is no evidence that the murder was planned or premeditated. He found that they were following on a recently stolen machine, as even state witnesses testified that, that

was the enquiry. He also accepted that the deceased was not known to the appellants. The facts seem to indicate that the appellants just gave a chase. Even though they were armed, it cannot be concluded that they had planned, prior, to murder the deceased. However, the appellants could be convicted for murder in furtherance of common purpose.

In **S v Mgedezi** 1989 (1) SA 687 (A) at 705 (I) to 706 (C)

Stated: "`In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in **S v Safatsa and Others 1988** (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

[20] In **S v Thebus** 2003 (2) SACR 319 (CC) par 49 the Constitutional Court re-iterated the position with regard to the doctrine of common purpose.

It stated:

> "If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended the criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue."

[21] The evidence herein established that when the appellants budged into the house where the deceased was a guest, they each carried a weapon. Sinaye hacked the deceased with a spade on the head. All others joined- in in the assault. When they were chased away by the owner of the house, after dragging a resisting deceased, they continued assaulting him outside until day break. All the appellants therefore had the necessary *mens rea* to kill the deceased. They assaulted him mercilessly over a long time.

[22] The sentence of life imprisonment could therefore only be deviated on, if the court found that there were substantial and compelling circumstances justifying departure from imposing that sentence.

[23] Section 51(3) (a) of Criminal Law Amendment Act 105 of 1997 provides:

> "If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence …"

The magistrate did not make a finding that there are substantial and compelling circumstances justifying him to impose a lesser sentence. He also failed to record those circumstances.

[24] This constitutes misdirection; consequently this court is at liberty to consider the issue of sentence afresh.

[25] The following mitigation factors were placed before the court *a quo;*

Xolani was recorded as a 36 year old male with two girl children aged seven and three years. The seven year old is doing grade 5 at school. His wife was unemployed and lives in Cape Town with the children. The children receive child maintenance grant. He passed grade 9. He was working as a builder in a building contractor, earning R700.00 per fortnight. He was suffering from and was being treated for tuberculosis, at the time. He is a first offender. Sinaye was 20 years old. He was single with one girl child. He was self-employed as a builder and would get a minimum of R3 000.00 for each built structure. He lived with his paternal aunt and her family. Jongikhaya was 23 years of age. He was single with one year old boy child. He was doing odd jobs, cutting grass for R150.00 per yard. He passed grade 9. He stayed at home looking after the homestead, whilst his parents and siblings live in Cape Town, where his father works. Vuyolwethu

was 21 years old. He was single with no children. He also did odd jobs of cutting grass and earned between R150.00 and R400.00 per yard. He lived with his parents and siblings. Only his father was doing odd plumbing jobs.

[26] The aggravating circumstances in this matter on the other hand are that the appellants took the law into their own hands. The courts ought to be seen to be showing their displeasure on such conduct. The prosecutor submitted that there is a possibility that they attacked a wrong person. The deceased was sleeping unsuspecting, he was not found with any of the stolen items. The offence is very serious in that, life that was lost can never be replaced.

[27] In **S v Malgas** 2001 (1) SACR 469 (SCA) at paragraph 24 the court stated:

> "F. All factors (other than those set out in D above) traditionally taken
>
> into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
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> G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively to justify a departure from standardised response that the legislature has ordained."

[28] The prosecutor in the court *a quo* submitted that the fact that the appellants were young constituted substantial and compelling reason to deviate from the prescribed sentence. However, this loses sight of what was said in **S v Matyityi** 2011 (1) SACR 40 SCA at **para** 14. Youthfulness without explaining what it meant in respect of a particular individual is not decisive in concluding whether it constitutes a substantial and compelling circumstances to deviate from imposing the prescribed sentence. A person of 20 years or more must show

acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigation factor. There has to be established clear evidence about his background, education, level of intelligence and etc.

[29] Having said that, I do find *ex facie* the record that the following circumstances, when considered cumulatively, amount to substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence:

The offence itself was an act of a spur of a moment. The appellants must have been angered by the break in. They are relatives. The two are siblings and the other two are their cousins. The break-in directly affected them. The three appellants are relatively young, all in their early twenties. They had never been away from their locality, except a brief stint one of them had in Cape Town. Due to their level of education I would regard them as not having had exposure and sufficient social outlook to enhance their level of maturity. None of the appellants had a previous conviction. Xolani, in particular, at 36 years of age, had never had brushes with the law.

[30] During the hearing in this court both counsel submitted that a term of eighteen (18) years imprisonment, is not disproportionate in the circumstances of this case. This I agree to, despite the fact that I had to reconsider the basis for the said sentence. Having balanced all the relevant factors, I am of the view that the offence that involves tracking down a person, wake him up and attack him to death calls for such a term of imprisonment. Despite the misdirection by the Magistrate the sentence of eighteen (18) years imprisonment is still appropriate. (See: *S v Fatyi* 2001 (1) SACR 489 SCA at paragraph 7.

In the result;

1. The appeal against conviction and sentence is hereby dismissed.

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B Majiki
Judge of the High Court

I agree, **MAKAULA J**

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M MAKAULA
Judge of the High Court

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