

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A295/2006

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED. <u>✓</u>
<u>21.9.2018</u> DATE	
<u>PP</u> SIGNATURE	

In the matter between:

SITHOLE, KHULUMAOKUHLE

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

KARAM AJ:

A. INTRODUCTION

1. On 19 May 2005, the Appellant was convicted in the Johannesburg High Court of the following:-

- 1.1 count 1 – attempted robbery with aggravating circumstances;
- 1.2 count 2 – attempted murder;
- 1.3 count 3 – murder;
- 1.4 count 5 – attempted murder;
- 1.5 count 6 – attempted murder;
- 1.6 count 7 – robbery with aggravating circumstances;
- 1.7 count 8 – unlawful possession of a firearm; and
- 1.8 count 9 – unlawful possession of ammunition.

Save for counts 1, 8 and 9 aforesaid, the other counts were read with the provisions of Act 105 of 1997 (“the minimum sentence legislation”).

2. On 23 May 2005 the Appellant was sentenced as follows:-

- 2.1 count 1 – 15 years imprisonment;
- 2.2 count 2 – 5 years imprisonment;
- 2.3 count 3 – life imprisonment;
- 2.4 count 5 – 5 years imprisonment;
- 2.5 count 6 – 5 years imprisonment;
- 2.6 count 7 – 15 years imprisonment;

2.7 count 8 – 5 years imprisonment;

2.8 count 9 – 12 months imprisonment.

It was ordered that the sentences imposed on counts 5 and 6 run concurrently. Similarly, that the sentences imposed on counts 8 and 9 run concurrently.

3. On 13 April 2006 the Appellant was granted leave to appeal on both conviction and sentence.
4. Accordingly, the matter comes before us, sitting as a Full Court of Appeal, in respect of both conviction and sentence.
5. Condonation for the late filing of the Appellant's heads of argument was sought and granted.
6. At the outset, this Court had two concerns namely:
 - 6.1 The fact that the charges as reflected in the indictment, did not correspond with the Appellant's ultimate convictions and sentences.

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Notwithstanding this, it was apparent that this was merely a numerical error on the part of the trial Court. Both counsel confirmed same and further, that there was no prejudice of whatsoever nature to either party arising therefrom.

- 6.2 The delay of some 12 years in having this matter enrolled for hearing.

Counsel for the Appellant and Respondent furnished the Court with written reasons, including an affidavit. It transpired that the matter had in fact been set down for hearing on at least two prior occasions, on which occasions the matter could not proceed due to the record having to be reconstructed and the inability to locate the Appellant, he allegedly having used different names whilst incarcerated.

B. FACTUAL BACKGROUND

7. On 28 September 2003 Mrs June Motto-Ros ("June") the mother of the deceased, Ms Margaret Meyer ("Maggy") the deceased's girlfriend, and a neighbour Auntie Grace, were having coffee on the patio at June's residence in Moffat View. The deceased was sleeping on the back seat of his vehicle which was parked outside June's residence. It was in the late afternoon when Maggy decided that she and the deceased should leave.

She unlocked the vehicle and as she was about to enter same, a male

approached, produced a firearm and pointed it at her head, demanding the keys of the vehicle. June, who was standing with Maggy, grabbed the vehicle keys from Maggy's hand and threw them in to the street, telling the assailant that he could fetch them once she had managed to get Maggy and the deceased into her home. As Maggy was waking up the deceased, advising him of what was happening, the assailant returned to the vehicle with the keys. Maggy quickly entered the vehicle at the driver's door and locked same manually, thereby locking all the doors to the vehicle. Each door could, however, be unlocked manually from the inside of the vehicle.

Whilst June was attempting to try and get the deceased out of the vehicle, several shots were fired by the assailant and she was struck by a bullet. The deceased alighted from the vehicle and was shot by the assailant twice in his chest.

The assailant entered the vehicle at the driver's door, opening same with the remote and pushed Maggy from the driver's seat where she was seated to the front passenger seat, and locked the vehicle. He started fumbling with the keys in an attempt to unlock the gear-lock that was affixed to the gears of the vehicle.

June then screamed at Maggy to open her door manually, which Maggy did, and the assailant and June engaged in a "tug of war" over Maggy. June ultimately succeeded in pulling Maggy out of the vehicle.

The assailant then reversed the vehicle down the street, not having succeeded in removing the gear-lock. June ran after the vehicle,

wanting to kill this person who had shot her son. The vehicle stopped at an intersection and June entered same through the front passenger door which Maggie had earlier unlocked, and commenced throttling the assailant.

In the meantime, a Mr Timothy Gaisford ("Tim"), whose father in law resided in the same street as June, witnessed what he believed to be a hijacking, as he was reversing his vehicle and trailer out of the driveway of his father in law's residence. He rushed inside that residence and pushed the panic button and then returned to his vehicle. His 7 year old son was with him in the vehicle. He saw the deceased's vehicle reversing, followed it with his vehicle and purposefully collided his vehicle into that of the deceased at the intersection. June, having seen Tim's vehicle approaching, had sprung out of the deceased's vehicle prior to the collision.

The assailant exited the deceased's vehicle and, a metre away from Tim, commenced firing shots at Tim. Five of the shots fired struck Tim and various others struck his vehicle. Tim shouted to his son to exit the vehicle and run away, which his son did. The assailant entered Tim's vehicle, which was idling, and drove off. Tim's vehicle was fitted with an anti-hijacking device and was later found abandoned 5 kilometres away.

C. AD CONVICTION

8. It is common cause that the only evidence linking the Appellant to the crimes is the identification of the Appellant as the perpetrator, by June

and Maggy. Tim was unable to identify the assailant and was accordingly not called to attend the subsequent identification parade.

- 8.1 It is abundantly evident that both women had ample opportunity to properly observe the hitherto unknown assailant on the day of incident. *Inter alia*, the events unfolded in the late afternoon of 28 September 2003. It was a clear day, the sun had not set as yet and visibility was good. The aforesaid identifying witnesses were in very close proximity to the perpetrator at the various stages that the events unfolded. The perpetrator wore nothing on his head/face that would hinder a proper identification of his face.

The identifying witnesses, and in particular June, did not spend a fleeting moment in the presence of the perpetrator. Rather, their interactions with him endured for several minutes. June, in particular had run after the perpetrator who was in the process of reversing the gear-locked robbed vehicle in count 1, and commenced throttling the perpetrator advising him that she would identify him. Maggy, at the stage that the perpetrator had entered that same vehicle that she had locked herself in and forced her from the driver's seat to the front passenger seat, was looking directly at him when pleading with him to allow her to exit the vehicle.

I have considered what is stated in the seminal judgment of **S v Mthethwa 1972 (3) SA 766 (A)** and in the subsequent decisions of the Supreme Court of Appeal on the issue of identification.

8.2 Less than three weeks later and on 16 October 2003 these witnesses attended an identification parade at which parade both witnesses identified the Appellant as the perpetrator.

8.3 It was admitted at the trial that the identification parade was properly conducted.

8.3.1 Regarding June's identification of the Appellant at the parade, the issue arose that she had not properly or accurately identified the Appellant regard being had to what is recorded on the SAP 329 form that he was the fifth person pointed out by her and that she had taken 7 minutes to do so. This is reflected on page 449 of the record.

8.3.2 Notwithstanding June's alleged uncertainty *ex facie* the SAP 329 form, the trial court accepted her identification of the Appellant as proper in the circumstances and I have no hesitation in endorsing same. She testified and was vigorously cross-examined. Her evidence was that she was seated in another room and a one-way mirror/glass separated her from the suspects on parade. In her calling forward of the four suspects, she was embarking on a process of elimination. This was the first time that she had attended an identification parade and had not been advised by any officer as to what to do. She was merely told to look for the person who she thinks had shot her son. She did not advise the officer that she was embarking on this process of elimination. The Appellant

was the fifth suspect she requested to step forward. He had been standing with his head lowered, his chin on his breast. She had requested the officer in the parade room on more than one occasion to ask the Appellant to lift his head. He did not. Ultimately, the officer lifted the Appellant's head. Upon the officer lifting the Appellant's head, June became hysterical and started banging on the window stating, "that is him, that is him, that is him," and proceeded to cry. The SAP 329 form reflects that June pointed out the Appellant "as die person wat haar seun geskiet het".

- 8.3.3 June stated that she did not verbalise her reasons to the officer for eliminating the four suspects. However she testified as to why she had eliminated them. It is regrettable that with the elimination of the first four suspects, Detective sergeant Du Plessis, who was in charge of the parade and who completed the SAP 329 form, did not specify thereon June's remarks, namely: "no, no it is not him" or "not him, take him away". He was in hospital at the time the trial proceeded and did not testify.

Notwithstanding this, I am of the view that the trial Court correctly accepted her credible explanation as to the process of elimination that she embarked upon. There is nothing whatsoever to suggest that her identification of the Appellant reflected any doubt or uncertainty on her part.

The Appellant's counsel conceded that the contradiction he refers to in June's evidence was immaterial in nature and further, that there was nothing intrinsically wrong with her process of elimination.

- 8.4 Maggy pointed out only the Appellant, and, in a matter of 45 seconds. She testified that she did not call the Appellant out immediately as she wanted to look at the face of each suspect in order to ensure that her identification of the Appellant was correct/accurate, hence the 45 second period before she called him forward. She, too, had to request, on more than one occasion, that the Appellant lift his head.

Counsel for the Appellant conceded that her description of the perpetrator as skinny and small in build was subjective and that there is no evidence or even a suggestion that she discussed June's pointing out of the Appellant prior to her doing so.

The argument that the subsequent identification of the Appellant by Maggy was coincidental is, in the circumstances, untenable and devoid of any merit.

9. A further argument raised was that the copy of the photograph of the Appellant, allegedly taken at the time of his arrest,

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reflected that the Appellant had facial hair and that this contradicted the evidence of both June and Maggy that the perpetrator was clean shaven.

The Appellant's counsel conceded in argument that having regard to the extremely poor quality of the copy, coupled with the shadows and marks reflected thereon, and the fact that the alleged facial hair on the Appellant's left cheek does not reflect what is on the right cheek, does not support such argument and involves sheer speculation.

Obviously, if the original photograph was found and did reflect that the Appellant had a beard and/or moustache the day following the incident, there would indeed have been merit in such argument.

I am of the view that both June and Maggy were credible and impressive witnesses and that the trial Court correctly accepted their evidence and identification and that same constituted proof beyond reasonable doubt that the Appellant was, in fact, the perpetrator of these offences.

10. The Appellant, on the contrary, was an unimpressive witness, to say the least.

His version was that he was at his father's residence on the day of the incident from 10h00 until 18h00, at the request of his father and assisted his father to clean the yard. At 18h00 he left to meet his girlfriend. His siblings reside at this residence with his father. There were also other people who rented shacks there in the yard, who would have seen him leaving his father's residence at 18h00.

Whilst it is trite that where an alibi is raised, there is no burden on an accused to prove his alibi

S v Shabalala 1986 (4) SA 734 (A),

it is surprising that none of these people were called to corroborate his version and nothing was stated as to their unavailability. It was never disputed that he was arrested at the bar the day after the incident for unlawful possession of a firearm, yet he denied this in his evidence, stating that he had been arrested for drinking in public.

The Appellant was extremely evasive, contradicted his version in material respects, and his evidence was so unconvincing that the trial Court, correctly, rejected same.

D. AD SENTENCE

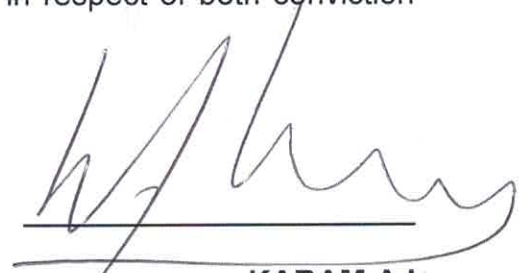
11. Counsel for the Appellant, wisely in my view, did not vigorously pursue the appeal on sentence.

The trial Court properly considered sentence. This was a careless and brutal series of offences and if any criticism is to be levelled thereat, it may be that the imposition of only 5 years imprisonment for the attempted murder of Tim, in the circumstances, may be viewed as startlingly lenient.

The Appellant can further consider himself fortunate in not having been charged with the attempted murder of Tim's son.

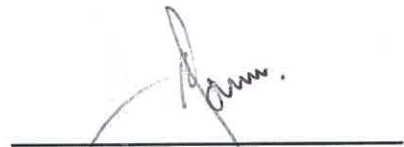
The trial Court correctly found no substantial and compelling circumstances to be present in the imposition of the 15 years sentence in respect of the robbery of Tim's vehicle and the sentence of life imprisonment for the murder of the deceased.

Accordingly, I am of the view that there is no merit whatsoever in this matter and that the appeal be dismissed in respect of both conviction and sentence.



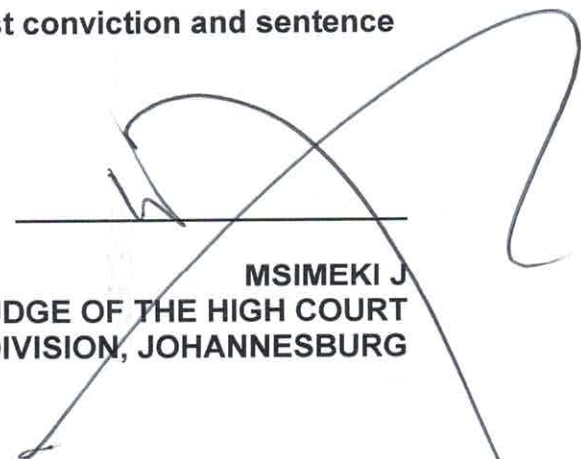
KARAM AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree.



JOHNSON AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it is so ordered. The appeal against conviction and sentence is dismissed.



MSIMEKI J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPELLANT : Adv Robbertse.

INSTRUCTED BY: Legal Aid SA.

COUNSEL FOR RESPONDENT : Adv Makua.

INSTRUCTED BY: DPP GLD.

DATE OF HEARING : 3 September 2018

DATE OF JUDGMENT : 21 September 2018