

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



CASE NO: A118/2018

Delete whichever is not applicable

- (1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: 12/11/ 2018

Signature.....

Hawley

In the matter between:

MATSOKA, SELLO

MOYO, NICHOLAS

MAFUTA, TEBELLO

First appellant

Second Appellant

Third Appellant

and

THE STATE

Respondent

J U D G M E N T

MAIER-FRAWLEY AJ:

1. The appellants were each indicted in the regional court, presiding at Newlands, on one count of murder. The State averred that on 9 February 2014 and at or near Riverlea, the appellants unlawfully and intentionally killed Sipho Mthetwa ('the deceased') by hitting him with bricks and sticks, acting directly or in common purpose.
2. The appellants were warned of the statutorily prescribed minimum sentence that could be imposed upon conviction, as envisaged in section 51(1) of the Criminal Law Amendment Act, 105 of 1997 ('CLAA').
3. The appellants were legally represented during their trial. They pleaded not guilty to the offence and offered no plea explanation.
4. The appellants however made certain admissions, which were recorded in terms of section 220 of the Criminal Procedure Act, 51 of 1997, amongst others, that the deceased died as a result of blunt force injuries that he sustained in the incident on 9 February 2014. It was not disputed that the deceased was attacked by an armed group of men who hit him with sticks or that the deceased was trampled on and stoned with bricks and that he died as a result of various injuries inflicted on his person as a result thereof.
5. Each of the appellants' denied that they were at the scene of the incident or that they participated in the commission of the offence on the night in question. In the result, the trial turned primarily on the question of the identity of the perpetrators involved in the assault.
6. The trial court convicted the appellants as charged and sentenced each one to 12 years imprisonment. In addition, all the appellants were declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

7. The appellants' appeal to this court against both their conviction and sentence, with leave of the court a quo.
8. At the trial, the state relied principally on the evidence of a single eye-witness, the complainant, Ms. Daneu Modisi.¹

Conviction

9. Briefly, the State's case was the following: On the night of the incident the complainant was at her house in Zamambilo Informal Settlement, Riverlea ("Zamambilo"), when she heard the deceased screaming words to the effect that he was dying. The screams were coming from outside the house. She went towards the outside and saw a group of about 18 men attacking the deceased with sticks and bricks and trampling on him whilst he was laying on the ground. A brick was also placed on the deceased's neck. She observed the incident for about 30 minutes whilst standing in a passage located approximately 5 metres away from the scene. Amongst this group, the complainant was able to identify five men. Her evidence suggests that her attention was drawn to those² whom she was able to recognise from within the group.³ The area was sufficiently lit by means of a light that shone from a nearby Spaza shop situated about 6 metres away from the scene of the incident.
10. The complainant knew each of the appellants by sight prior to the incident. She saw them frequently, as they lived in the same area as the complainant in Zamambilo. More specifically, she had known the first appellant for a period of two to three months prior to the incident. She would see him about twice a week in the street and he would refer to her as 'sister' in greeting, as they both hailed from Lesotho.

¹ Ms. Modisi and the deceased were life partners. The deceased was the father of their minor children.

² The men whom she was able to identify by sight from amongst the mob of attackers included the three appellants.

³ Or stated differently, the complainant recognised those who were known to her amongst the group.

The complainant knew the second appellant for about a year prior to the incident, during which time she saw him frequently in the area. He used to live in the same area as the complainant at Zamambilo before moving. The third appellant resided in the same area as the complainant 'for a long time' and she also saw him often in the street.

11. The complainant testified that she saw each of the appellants participating in the assault. She was able to recount the role that each appellant had played in the incident. For example, she narrated that the first and second appellants were carrying bricks and that they stoned the deceased and trampled on him whilst he was on the ground. The third appellant struck the deceased many times with a stick and a radio which he was carrying. This ensued amidst the agonising cries of the deceased.
12. The first appellant conceded, when testifying, that he knew both the complainant and deceased. He knew the complainant both by sight and by name. He referred to the complainant as 'Sis Denau' when testifying in his defence. As such, the complainant was not mistaken about his identity, rather, he suggested during his testimony that she was lying about his presence at the scene as well as his participation in the incident.⁴ The first appellant did not rely on an alibi defence.
13. When testifying in their defence, the second and third appellant's confirmed that they knew both the complainant and the deceased prior to the incident. The second appellant would see them at the dwellings in the informal settlement whilst the third appellant had known them since 2011.

⁴ The first appellant contended that the complainant was lying because she was 'looking down on him' and taking him 'for granted,' although there had never been any friction between them prior to the incident.

14. As pointed out in *R v Dladla and others*,⁵ one of the factors which carries great importance in the case of identification, is the witness's previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his or her identification will be accurate, is substantially increased.
15. The central issue requiring determination in the appeal is whether the trial court erred in finding that the identity of the appellants was proven beyond a reasonable doubt, and, on the alibi defence, that the alibi was false beyond a reasonable doubt. *All* the evidence must be considered. See *S v Van Der Meyden*.⁶
16. In my view, the trial court correctly evaluated the evidence on the basis propounded in *Van Der Meyden supra*. The learned magistrate, in a detailed judgment, carefully analysed the evidence of *all* the witnesses and left none of the material evidence out of account.
17. The trial court found the complainant to be a credible, honest and reliable witness, whose testimony appeared to be truthful 'beyond the slightest shred of doubt.'⁷ Proper regard was also had to the fact that it had not been suggested on behalf of the appellants during cross-examination of the complainant that she was misleading the court or that she was giving false evidence or that she had a motive falsely to implicate the appellants. There were, in my view, no material contradictions or inconsistencies in her evidence. She stood steadfast on the essential aspects of her evidence against the appellants and her evidence regarding the identity of the assailants was clear and unwavering.

⁵ 1962 (1) SA 307 (A) at 310C.

⁶ 1999(1) SACR 447 (W) at 449J-450B, where the following was said: '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 to 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 of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

⁷ On a holistic approach, it cannot be said that the trial court was wrong in this regard.

18. The Supreme Court of Appeal held as follows in *S v Pistorius* 2014(2) SACR 315 (SCA) para 30:

"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings."

19. The trial court found, correctly so my view, that the complainant's identification of the appellants was reliable and sound⁸ and that her evidence was clear and satisfactory in all material respects. In so doing, it evaluated her evidence, as a single witness, with the necessary caution as it was enjoined to do. See: *S v Mthetwa*.⁹
20. As regards the alibis of the second and third appellants, the second appellant testified that he was at his rented accommodation in Braam Fisher on the day of the incident, watching television, and that his landlord was present. The third appellant testified that he was at home on the date of the incident, doing laundry with one, 'Dahesh,' who lived with him in a dwelling in the informal settlement.

⁸ The complainant had ample opportunity to observe the assailants of the deceased over a 30 minute period of observation, in which regard, see: *S v Mehlape* 1963 (2) SA 29 (A). She identified the assailants, not only because she knew them but because she could see what they doing. The scene of the incident was sufficiently lit. And the complainant was standing in close proximity to the scene. She was able to visualise what each assailant did during the course of the assault. It differed from person to person. The probability that her identification was accurate was enhanced by her knowing the appellants prior to the incident.

⁹ 1972 (3) SA 766 (A) at 768A-C. See too: *Sv Charzen and Another* 2006 (2) SACR 143 (SCA at para 11.

21. The alibi defence relied on by the second and third appellants, was disclosed for the first time during the presentation of the defence cases.¹⁰ In *Thebus and another v S*,¹¹ the Constitutional Court affirmed the rule of evidence that the late disclosure of an alibi defence affects the weight to be placed on the evidence supporting the alibi. In my view, the trial court was correct in not placing credence on the alibi evidence in the light of the totality of the evidence presented at the trial.¹² The trial court concluded that there was no reasonable possibility that the complainant's identification could be mistaken vis-a-vis the second and third appellants;¹³ that her identification of all three appellants was beyond reproach and that her evidence was reliable and compelling. At the end of the day, the undisputed evidence was that the complainant stood and watched how the appellants and other assailants beat the deceased to the point of death amidst his pleading cries that they were killing him.
22. The trial court correctly considered the probabilities against the facts of the case in concluding that the state had proven the guilt of the appellants beyond a reasonable doubt. In this regard, see: *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15¹⁴ and *S v Phallo & Others* 1999(2) SACR 558 (SCA) at 562, para 10.¹⁵

¹⁰ As regards the alibi witness called by the second appellant, such witness could not account for the second appellant's whereabouts during the critical time at which the incident occurred on that fateful night. The learned magistrate found the evidence of the third appellant's alibi witness to be unimpressive in certain respects, correctly so, in my view. In his judgment, the learned magistrate pointed to instances where the witness had tendered confusing and contradictory evidence on critical aspects, such that it could not be said to be supportive or corroborative of the third appellant's version, and thereby lacking in credence.

¹¹ 2003 (6) SA 505 (CC) at para [65]. At para [68] the following was said: "*The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by him or her for failing to disclose the alibi timeously within the factual context of the evidence as a whole.*"

¹² See fn 10 above.

¹³ As indicated earlier, the first appellant did not rely on 'mistaken' identity.

¹⁴ In *Chabalala*, the following was said: "*The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen* 2001 (2) SACR 97 (SCA). *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. The result may prove that one scrap of evidence or one*

23. Having regard to the foregoing, I am satisfied that the appellants have been correctly convicted and I would recommend that the appeal against conviction be dismissed.

Sentence

24. The imposition of sentence is pre-eminently a matter falling within the discretion of the trial court and a court of appeal will only interfere with that exercise of discretion where it is convincingly shown that it has not been properly or judicially exercised¹⁶ or where the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.¹⁷
25. The learned magistrate carefully considered all relevant factors in deciding on sentence, as foreshadowed in *S v Zinn*.¹⁸ The offence with which the appellants were convicted carried a minimum statutorily prescribed sentence of life imprisonment in terms of section 51(1) of the CLAA.
26. The trial court, however, found that there were substantial and compelling circumstances that justified the imposition of a lesser sentence than the prescribed

defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence...

¹⁵ In *Phallo*, the following was said: "...In our law, the classic decision is that of *Malan JA* in *R v Mlambo* 1957 (4) SA 727 (A). The learned Judge deals, at 737F-H, with an argument (popular at the Bar then) that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence.' *Malan JA* rejected this approach, preferring to adhere to the approach which 'at one time found almost universal favour and which has served the purpose so successfully for generations' (at 738A). This approach was then formulated by the learned Judge as follows (at 738A- C): 'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.'..." (own emphasis)

¹⁶ See: *S v Blank* 1995 (1) SACR 62 (A) at p.65. See too: *S v Malgas* 2001 (1) SACR 461 (SCA).

¹⁷ See: *S v Rabie* 1975 (4) SA 855 (A) at 875 D-F; See *S v Rabie* 1975 (3) SA 855 at 857 and *S v Sadler* 2000 (1) SACR 331 SCA; *S v Kgosimore* 1999 (2) SACR 28 SCA.

¹⁸ 1969 (2) SA 537 (A).

minimum sentence. *Inter alia*, the trial court considered that long term imprisonment would have exceedingly adverse effects on the appellants, who were first offenders and that the likelihood was strong that the minimum sentence, if imposed, would serve to destroy the appellants. The trial court also considered the fact that the appellants had spent a period of 2 years in custody before they were sentenced.

27. In *S v Malgas*, at para 22, the SCA reasoned as follows:

“...The greater sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once the court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

28. A healthy dose of mercy was factored into the sentences, considering the brutality of the murder of the deceased, and the utter havoc that it wreaked upon the lives of his dependants, including the complainant.
29. It cannot be said that the learned magistrate misdirected himself in any shape, form or manner or that the sentence is disturbingly inappropriate, such that it would justify this court in interfering therewith.
30. Accordingly, the appeal against sentence should also be dismissed.


MAIER-FRAWLEY AJ

I agree:


FISHER J

Date of hearing:
Judgment delivered

25 October 2018
12 November 2018

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