



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: A133/2017

In the matter between:

SS MYOHLAKALE

1st Appellant

KN PHATSOANE

2nd Appellant

XL BOKOLOSHE

3rd Appellant

and

THE STATE

Respondent

HEARD ON: 7 MAY 2018

CORAM: LEKALE, ADJP *et* MHLAMBI, J

JUDGMENT BY: LEKALE, ADJP

DELIVERED ON: 10 MAY 2018

SUMMARY: Criminal law- Inability of accused to furnish acceptable reason as to why witnesses incriminate him falsely not *per se* adequate to sustain a conviction - Test remains whether or not guilt proved beyond reasonable doubt- Appellants' versions reasonably possibly true- Appeals upheld- Convictions and sentences set aside.

- [1] On 12 July 2016 the three appellants, who were legally represented, were jointly convicted of public violence as count 1 with the first appellant also being convicted of assault with intent to cause grievous bodily harm as count 3 while appellants two and three were, on their part, further convicted of attempted murder on count 2 by the Regional Court sitting at Welkom. They were thereafter sentenced to three years imprisonment on count 1. The first appellant, further, received five months imprisonment which was wholly and conditionally suspended for assault GBH while the second and third appellants were each sentenced to a further four years imprisonment for attempted murder which was directed to run concurrently with the sentence for public violence.

- [2] The appellants feel aggrieved by the convictions and sentences. They now approach us on appeal against the same with leave granted by this court on petition.

- [3] On returning the guilty verdicts the trial court found that the complainant on count 2 was certain and adamant in his evidence before the court that the second and third appellants were the culprits although he had made previous inconsistent statement to the police implicating the first appellant and some other person who was acquitted. The court below, further, found that the complainant on count 3 was also sure in his evidence that the first appellant attacked him with a brick on the eye. The court *a quo*, furthermore, held that the appellants' defence on their involvement was a bare

denial although it was clear from their own evidence that they were part of a group of members of Association of Mineworkers and Construction Union (AMCU) who rendered the Beatrix Mine uncontrollable and ungovernable on the relevant day and also assaulted people in the process. The court below, further, effectively rejected appellants' version that they were falsely implicated on the basis that they could not furnish the rationale behind such conduct on the part of their accusers or what the witnesses stood to gain from doing so.

- [4] On the papers and in argument before us Mr Langenhoven for the appellants submits, *inter alia*, to the effect that it is wrong, according to case law, to expect the accused to explain why State witnesses incriminate them falsely with the question simply being whether or not the State proved its case beyond reasonable doubt. He, further, submits that the evidence of the attempted murder victim amounted to dock identification in so far as he could not identify his assailants to the police and only did so in court when he saw the appellants in the dock. In his view the appellants gave credible evidence which is reasonably possibly true. As to sentences the appellants contend that the trial court did not consider any alternatives to direct imprisonment such as correctional supervision regard being had, *inter alia*, to their personal circumstances such as the fact that they were employed and were family men with dependants.
- [5] On its part the State, through Mr Ferreira, supports the convictions and sentences contending, *inter alia*, that the trial court correctly evaluated the case and had regard to probabilities. He, further, submits that the court *a quo* correctly found that the appellants' respective defences amounted to a bare denial although it was clear

that they were part of trade union members who made the mine uncontrollable and ungovernable. On impugned sentences he submits, *inter alia*, that the sentences are appropriate and that the trial court did not commit any irregularity or misdirection.

- [6] The factual basis for the convictions is apparent from the evidence of two of the witnesses called by the State in support of its case against the appellants. The complainant on count 2 *viz.* attempted murder, one **Sinothembile Madiloye** (Madiloye) testified, *inter alia*, to the effect that he is a shop steward for the National Union of Mineworkers (NUM) employed as steward for health and safety at Beatrix Mine no.3 shaft. On the fateful afternoon around knock-off time he was at the NUM offices at number 3 shaft when he noticed people in AMCU t-shirts singing, hitting and banging on the trees outside. He proceeded to the bus terminus to catch the bus back home but saw people running out of the bus pointing out that members of AMCU were chasing them out. He had a NUM t-shirt on and heard one of the AMCU members saying here is another member of NUM. The third appellant was firing instructions to the effect that people should be taken out of the buses and directing AMCU members to get into the buses. He retreated and on his way back he saw stones being thrown around. The third appellant hit him with a brick on the left side of the head and he sustained an open wound. He felt dizzy and ran for cover but the second appellant hit him on the head with a pick handle. He bled profusely and fell down. He heard someone shouting that these people are killing you before he lost consciousness.

- [7] The complainant on count 3, **Bongani Masikisiki** (Masikisiki) testified that he was standing and chatting to an acquaintant when

he heard a noise and saw AMCU members coming in their direction. The first appellant was amongst them and, eventually, hit him against the right temple with a stone. He knew all the appellants as they used to be members of NUM before they joined AMCU.

- [8] The appellants' respective defences are apparent from their *viva voce* evidence before the trial court. The first appellant admitted having been at the scene of the crimes but denied that he participated in the crimes in any way testifying that he was initially branch chairperson of the NUM before he joined AMCU. He pointed out that on the day in question AMCU members were scheduled to attend a mass meeting of their union at number 4 shaft and buses were arranged with management to ferry them from number 3 shaft. The buses did not arrive on time at the boxing arena where they were expected and he contacted the third appellant to inform him accordingly. A decision was taken by the members to proceed in the direction of the bus terminus next to the change house in order to meet the buses halfway. When they arrived at the terminus they found the buses waiting to take mineworkers to their various destinations back home. Some of his fellow union members, thereupon, got into a bus scheduled for Welkom. The third appellant arrived and made it clear to all and sundry that arrangements had been made with mine management for other buses to come to pick them up and that mine security officer was available to control the situation. Members alighted and their buses, eventually, arrived. When their buses departed he noticed that a car belonging to a member of NUM was blocking the road and their buses could not pass. The union members, thereupon, got frustrated and angry because of the further delay and got out of the bus going in the direction of the relevant obstruction. He, the third appellant

and one other person went to stop their fellow members in their tracks. The mine security officer joined them in that exercise. NUM members were on the other side. A fight thereupon broke out between members of the two trade unions and, on their part, they did not manage to stop the fighting. Madiloye, thereupon, came out in a hurry, grabbed a walking stick from Masikisiki and used it to hit AMCU members. The situation got out of hand and the fighting ensued.

[9] The second appellant testified that on 5 February 2015 when he knocked off duty he went to catch a bus to number 4 shaft for the AMCU meeting. As the buses were departing he saw AMCU members in another bus pointing in the direction of a car parked in the road obstructing traffic. The car in question was used by the branch chairperson of NUM. He alighted and went in the direction of the relevant obstruction but a colleague advised him to go back as people were throwing stones. He accompanied the colleague in question back in the direction of the bus. He saw AMCU members and NUM members throwing stones at each other. He never assaulted Madiloye and never participated in the mayhem in any manner whatsoever. He is just an ordinary member of AMCU. The meeting at number 4 shaft was to discuss and decide on the signing of the recognition agreement between AMCU and mine management.

[10] The third appellant also testified in his own defence disputing that he assaulted Madiloye in any manner whatsoever. He is a regional chairperson of AMCU and used to be chairperson of central committee of NUM before he joined AMCU. At the relevant time he was a member of the task team of AMCU and arrangements were

made with mine management for buses to be made available to transport their members to the mass meeting at number 4 shaft. He got information that busses were late. He followed up on the matter with the relevant manager. The latter confirmed the arrangement and asked him to advise AMCU members to move away from NUM offices as he had received a complaint. He repeated the evidence of first appellant as to what happened with the car blocking the road. He was travelling in a car and saw how AMCU members got out of the busses going in the direction of the relevant car. He, further, confirmed that Madiloye took a stick from Masikisiki as he and others, inclusive of the mine security officer, were trying to stop the people from fighting. Madiloye used the stick to beat people.

- [11] The inability of an accused person to proffer plausible reason for allegations against him is not, *per se*, a proper or sufficient ground for rejecting his evidence or convicting him. (See **Maseti v S** [2013] ZASCA 160 at para [26]).

- [12] Convicting an accused person only because the complainant has no apparent motive to implicate them falsely and they are unable to suggest one is based on a dangerous approach. (See **S v Ipeleng** 1993 (2) SACR 185 (T) at 189 C-D).

- [13] When confronted with conflicting versions the court adopts a holistic approach to the totality of evidence before it, considers the merits and demerits of each version and has regard to the probabilities. (See **S v Singh** 1975 (1) SA 227 (N) as approved in **S v Guess** 1976 (4) SA 715 (A) at 718H).

- [14] Proper approach is to evaluate conflicting versions against inherent improbabilities taking account of all the evidence. If after that exercise, it appears that the accused's version could reasonably possibly be true, even if it is improbable or in some respect untruthful, he is entitled to the benefit of doubt and to be acquitted. (See **Maseti v S** *supra* at para [27]; **S v Van der Meyden** 1999 (2) SA 79 (W) at 82 D-F and **S v Shackell** 2001 (4) SA 1 (SCA) para [30]).
- [15] In the absence of a misdirection on the part of the trial court, its acceptance of oral evidence is presumed to be correct until and unless it is shown to be wrong on adequate grounds and so are its conclusions on such evidence. (See **S v Francis** 1991 (1) SACR 198 (A)).
- [16] The question in the instant matter is whether or not the State proved its case against each appellant beyond reasonable doubt regard being had to the appellants' respective versions and the probabilities. It is, further, clear from recorded evidence that the appellants could not, in their evidence, furnish any plausible reasons why the complainants would implicate them falsely. It is, however, clear in our criminal justice system that there was, in the circumstances of the present matter, no evidentiary burden on the appellants to furnish such a reason. Failure on their part to furnish such a reason, therefore, did not constitute proper or adequate ground to reject their versions and/or to convict them. The question is, therefore, whether or not there existed any other circumstances before the trial court pointing to their culpability on the counts preferred against them.

- [17] The court *a quo* found that the appellants' defence was a bare denial of their involvement. A perusal of the record, however, indicates the contrary insofar as each appellant gave a detailed account of his movements on that day placing themselves on the scene of the crimes but giving exculpatory explanations. They even gave a full and undisputed explanation and background to the unfortunate incidence. It is, thus, not in dispute that the havoc was triggered by a car that was used to block the road by a local leader of the NUM. It is, further, clear from the record that members of NUM had a problem with members of AMCU attending a mass meeting at number 4 shaft for the purposes of giving mandate to their leaders to sign a recognition agreement with mine management. The reason for their misgiving was probably the fact that as a recognised trade union at the relevant workplace AMCU was going to be their rival and was possibly going to take their union's position as the majority trade union at the workplace.
- [18] The appellants, further, gave an explanation as to how the physical altercation was fuelled pointing to Madiloye as the culprit. In my view it can, therefore, not be said that their defence was a bare denial. If the trial court found that it was inherently improbable for the complainants to incriminate the appellants falsely because they knew them well, it was, in my opinion, equally inherently improbable for the third appellant, who was a leader and travelling in his own car, to have attacked Madiloye who, to his knowledge, knew him well as a former leader of NUM and thus risk being arrested. The same applies to the first appellant who used to be the branch chairperson of NUM before as well as the second appellant who was also reasonably aware that the complainants would be able to identify him as the assailant.

- [19] Madiloyi contradicted his statement to the police and it was common cause before the trial court that he suffered from amnesia after the attack. There was no medical and/or psychiatric evidence before the trial court to explain his condition in court and to support the finding that he was certain as to the identities of his assailants when he testified. Whether or not his evidence before the trial court as to the identities of his attackers was reliable remains the question regard being had to his condition and previous inconsistent statements as to the identities of such miscreants.
- [20] The roles that the first and third appellants played on the relevant day are, on their evidence, in line with their previous leadership positions at the NUM insofar as AMCU members would have looked to them for leadership as they reasonably knew them during their NUM days. They were late for a very important mass meeting and would not, reasonably possibly, have encouraged fighting and public violence to ensue thereby delaying their departure further. MUM members, on the other hand, would not reasonably possibly have been happy with them leaving their union to join a rival union.
- [21] In my view the appellants' respective versions were reasonably possibly true and the trial court did not even have to reject the State's case before it could give them the benefit of a doubt in our law. On the public violence count the trial court appears to have accepted evidence tendered against the appellants in support of counts 2 and 3 as proof of their guilt thereon insofar as there was no other evidence of their participation in public violence.

ORDER

[22] In the result the appeals succeed.

[23] The convictions and sentences are set aside.

LJ LEKALE, ADJP

I concur

JJ MHLAMBI, J

On behalf of Appellants:

Adv. GT Langenhoven

Instructed by:

Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of the Respondent:

Adv. AM Ferreira

Instructed by:

Director of Public Prosecutions
BLOEMFONTEIN