



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No. : A112/2018

In the matter between:-

MOJALEFA NYELELE

Appellant

and

THE STATE

Respondent

CORAM: NAIDOO, J *et* MOLITSOANE, J

HEARD: 26 NOVEMBER 2018

JUDGMENT BY MOLITSOANE, J

DELIVERED: 27 NOVEMBER 2018

[1] The appellant and his three co-accused were charged in the Regional Court sitting in Theunissen with murder read with the provisions of s51 of the Criminal Law Amendment Act 105 of 1997. He was convicted and sentenced to 20(twenty) years imprisonment. Leave to appeal his sentence and conviction was granted by this court following his successful petition to the Judge President. Mr Modise represented the appellant and Mr Bontes represented the state.

[2] The facts giving rise to these proceedings may be summarised as follows:

Nthabiseng Eunice Ramokgethi (Nthabiseng) was at the time of this incident in a love relationship with the deceased. On the 26th April 2013 at about 20h15 she and the deceased were walking from town when the latter stopped to pass water. While the deceased was busy passing water she heard a group of people talking. Deceased suggested that they enter into a yard of the house where he had been passing water. When they were about to pass a corner of that house they heard someone calling the name of the deceased. She looked back and she saw that it was accused number 4. She then ran out of the gate of that house and when she looked back she saw the deceased standing at the corner of the house. She testified that she also saw accused 4 drawing a shiny object from his waist. She further saw a group of about 11(eleven) people surrounding the deceased. Other members of that group went around the house. In the group she identified accused one, accused two and the appellant. She confirmed that she knew the appellant because at one stage

they were in the same class at school. She was adamant appellant was amongst the group but he just stood there.

[3] She testified that later she returned to the scene in the company of the aunt of the deceased and the police. They found the deceased at the house next to the one where they had originally entered. He had been stabbed to death. She did not know who killed him. The post mortem report that was handed in as an exhibit as well as the testimony of Dr Nieuwoudt, the pathologist, who was later called by the court indicated that the deceased was stabbed 22 times and he died of multiple stab wounds.

[4] On the other hand, the Appellant's version is that on the said day he had visited his friend known as Tulo. While at his friend's place he received a 'please call me' sms from his sister. He went home and arrived at 19h45. He testified that he watched a soap opera on television (commonly referred to as a soapie), whereafter he went to sleep. He denied any knowledge or participation in the death of the deceased. His sister, Tseleng Nyelele also testified on his behalf confirmed that the appellant arrived at home at about 19h45 while she was also watching a soapie. She confirmed that the appellant never left the house that night.

[5] The central issue in this appeal is the reliability of the identification of the appellant by the single witness Nthabiseng.

[6] State bears the onus to prove the guilt of an accused beyond a reasonable doubt. What is expected of an accused person is to give a version which is reasonably possibly true. The court will only return a verdict of guilty if it finds that not only is the version of the accused improbable but also that it is false beyond a reasonable doubt.

[7] The trial court is entitled to consider the probabilities and improbabilities. In **S v Chabalala** 2003 (1) SACR 134 SCA at para [15] Heher AJA (as he then was) held:

“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.”

[8] The state case is based on the evidence of a single witness, namely Nthabiseng. Section 208 of the Criminal Procedure Act provides that an accused may be convicted on the evidence of a single competent witness.(See **R v Mokwena** 1956(3) SA 81 at 85. Such evidence must be clear and satisfactory in all material respect. Not only must such evidence be credible but it must also be reliable. The court in **S v Sauls and others** 1981(3) SA 172 at 180 E-G said the following:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness...The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in his testimony,[if] he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1931(in Rv Mokoena), may be a guide to a right decision but it does not mean ‘ that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence where well founded....” It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense”

[9] This incident happened at night. It was just after 20H00 according to the evidence of Nthabiseng. She, however, indicated that it was visible as there was an Apollo light nearby. She testified that while running away she looked back and she saw accused 1 and 2. She originally said in cross examination that she managed to observe both accused 1 and 2 for 10 minutes. When pressed further on this issue she changed her version and said she could have observed accused 1 and 2 for ten seconds.

[10] According to Nthabiseng she ran away the moment she heard the name of the deceased being called. While she was running away she turned and made all these observations of who formed part of the group, how many people were in the group, who was holding a knife or a shiny object. According to the witness she was running away from the scene and not towards it. She was frightened .It is inconceivable that she could have observed all these things in ten seconds.

[11] It is true that she attended school with the appellant and knew him well. In that respect her testimony cannot be faulted. The

appellant also did not dispute the fact that they attended school together. Her testimony is reliable in so far as her prior knowledge of the appellant is concerned. Her reliability as to her prior knowledge of the appellant does not necessarily make her observation of the people who were in the group reliable. There is no corroboration whatsoever of her testimony. It is conceded on behalf of the respondent, in my view, correctly so that as much as her testimony is honest it cannot be said to be reliable. It is my considered view that the trial court erred in finding that the evidence of Nthabiseng was reliable.

- [12] In the evaluation of the evidence the court is obliged to take into consideration the totality of the evidence. Nthabiseng testified that she saw the appellant amongst the group of eleven people. According to her the appellant was just standing. No evidence was led whatsoever as to what he did in the attack of the deceased. The only thing she observed was that appellant had a shiny object and the group surrounded the deceased. Apart from that she cannot testify about what happened further. She cannot testify as to who stabbed the deceased 22 times. As a result of Nthabiseng's evidence that the appellant was present on the scene where the deceased was later found dead, the trial court found that common purpose had been proven. It is submitted on behalf of the respondent in the heads of argument that the following requisites in respect of common purpose have not been satisfied, namely,

- That there was no evidence that the appellant was aware of the commission of any offence on the night in question;
- That on the available evidence it could not be argued that the respondent had the common intention to murder the deceased with the rest of the group;
- That there was no act on record proving any act by the appellant in the killing or stabbing of the deceased;
- That there was no proof of intention to murder.

The testimony led thus fell short of the requisites for a conviction based on common purpose. **See S v Mgezezi** 1989(1) SA 687(A).

[14] The appellant raised a defence of alibi. The appellant was corroborated in material respects by his sister, Tseleng. I can find no reason to hold that his version is not reasonably possibly true. In any event, Mr Bontes candidly conceded that the appellant should not have been found guilty in this matter as there is no basis for such a conviction.

[15] Having regard to the totality of the evidence I am of the view that the trial court erred in finding that the state has proven its case beyond a reasonable doubt. Having regard to my finding regarding the verdict, it follows that the sentence cannot stand. I accordingly propose the following order:

ORDER

- (1) The appeal against the conviction is upheld.
- (2) The conviction and the sentence are hereby set aside

P.E.MOLITSOANE, J

I concur and it is so ordered

S. NAIDOO,J

On behalf of appellant: Adv. M Modise
Instructed by:
BLOEMFONTEIN JUSTICE CENTR

On behalf of the respondent: Adv. DW Bontes
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN