

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

REPUBLIC OF SOUTH AFRICA



Date of hearing: 3 March 2017

Case number: A191/2016

Case number court a quo: CC360/2010

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. OK
..... 05/04/2017	 SIGNATURE
DATE	

5/4/2017

In the matter between:

RONNIE NDIBA MALATJIE

First Appellant

NCHOKE RALPH MALATJIE

Second Appellant

and

THE STATE

Respondent

JUDGMENT IN APPEAL

BRENNER, AJ:

1. This is a full bench appeal against the conviction of the appellants, Ronnie Malatjie (accused 1 in the trial court), and Ralph Malatjie, (accused 2 in the trial court), on 13 February 2012, handed down by the Honourable Mr Justice Legodi, J, in the North Gauteng High Court, held at Phalaborwa.
2. The appellants, identical twin brothers, (and this was undisputed), were convicted on two counts of robbery with aggravating circumstances, one of murder, one count of illegal possession of an unlicensed firearm and one count for the illegal possession of ammunition.
3. They were sentenced on the same day to fifteen years on each robbery count, life imprisonment on the murder count, three years on possession of the firearm and one year on possession of ammunition. Counts one, three, four and five were to run concurrently with count two, being the life sentence. The effective sentence was therefore a term of life imprisonment.
4. Albeit that they applied for leave against conviction and sentence, they were granted leave to appeal against conviction only, this on 2 March 2015.
5. The issues on appeal pertain primarily to identification evidence. The enquiry is whether the respondent discharged its onus of proving beyond a reasonable doubt that the appellants were indeed the perpetrators of the crimes in question, all of which occurred on the evening of 19 October 2007, at about 20h00, near Nomathatha Café in Namakgale ("the Café").
6. The appellants contend that there was no proper identification, considering the inadequacies in the evidence of state witnesses, viewed against the alibis produced by the appellants, and the fact that none of the stolen goods was found in their possession.

7. Ronnie was arrested on 26 January 2008, and Ralph was arrested on 13 October 2008. They both had prior convictions, but none relating to robbery or murder. This is of no moment to the issues on appeal.
8. The appellants pleaded not guilty to all counts. Appellant 1, Ronnie Malatjie, declined to provide a plea explanation. Appellant 2, Ralph Malatjie, gave an alibi that he was not at the scene, and was in Gabasa Village at the time of the incident. Both appellants were legally represented at trial.
9. The evidence, succinctly summarised, was as follows. On the evening in question, several employees of the Café were closing the Café, and some of them were already in the back of the bakkie parked outside the premises, waiting to be transported home. These employees were: Esther Malatjie ("Esther Malatjie"), Clement Morema ("Morema"), Phillip Hlabane ("Hlabane"), Thami Dube ("Dube"), Maruping Malatji ("Maruping Malatji"), Umatapa Maake ("Maake"), and Semotso Moloto ("Moloto").
10. About five assailants approached the bakkie, one armed with a firearm. The assailants stole numerous items from the bakkie. This was the lawful property of Esther Malatjie, and/or six other persons present. The property included a cellphone belonging to Esther Malatjie, (which she had left in the bakkie when she fled the scene), cellphone airtime vouchers valued at R3 385,00, cigarettes worth about R2 660,00 and cash of about R716,00. They ran away with the stolen goods.
11. The bakkie was parked in a dark area some distance from the Café, preventing the employees from identifying the assailants. The employees fled the scene, save for Morema, who followed the assailants as they ran away with a box containing cigarettes and bucket containing money and airtime vouchers taken from the bakkie. While running after them he heard gunshots. He saw them holding a man standing near a vehicle and shooting him. At this juncture he decided not to follow them and ran back to the Cafe. He could not identify the assailants.

12. In close proximity to the Café, near a gravel road which intersects by way of a T-junction with a tarred road where the Café is situated, a certain Rahuma Walter Mojela ("the deceased") was standing next to his Toyota motor vehicle. After the robbery at the Café, the assailants, at least one of whom was armed, approached the deceased, shot him and alighted his vehicle. The deceased was pronounced dead on arrival at hospital.
13. It was undisputed that the offences were committed. The postmortem report of the deceased and photographs of his body were admitted under section 220 of the Criminal Procedure Act 51 of 1977. The cause of death was a gunshot wound to the neck, with the bullet moving into the left chest cavity and lodging in the spine.
14. The trial commenced on 27 October 2010, some three years after the event. Three assailants had been arrested, including the two appellants. The third assailant, accused 3, Sello Vincent Maboko, ("Maboko" or "Sello"), had since died. He had escaped from custody while on trial in this case, and was shot dead when the police tried to re-arrest him. The remaining assailants were still at large.
15. At the hearing, it was contested by Counsel for the appellants that the pointings out made by Ronnie Malatjie to Captain Selepe on 27 January 2008 were admissible, and that the alleged confession made by Ronnie Malatjie on 15 October 2008 to Captain Sekgobela was admissible. On 13 January 2012, the trial Court ruled against the admissibility into evidence of the pointings out and confession. This ruling is therefore of no moment to the appeal.
16. An inspection in loco took place, from 11h00 to 13h00, in January 2012, with the assistance of state witness Venecia Malahle ("Malahle"), at which the following was revealed:
 - a. the Café is next to a tarred road, which intersects with a gravel road by means of a T-junction;

- b. While walking from Jam Alley tavern with Rebonai Shai ("Shai") and Tshepiso Mametja ("Mametja"), along the tarred road, in the vicinity of the Café, Malahle saw the assailants for the first time at the Café at a distance of about 91 metres; this was near where the deceased's vehicle was parked at the time;
- c. There was an Apollo light about 163 metres south of the Café and another Apollo light about 163 metres north of the Café, both at heights of about 36 metres;
- d. The distance between the deceased and his vehicle and where Malahle and the other witnesses hid away at the home of a third party was about 17 metres;
- e. Near the T-junction, where the vehicle was parked, there is another Apollo light, about 18 metres in height, which was about 179 metres away from the T-junction; according to Malahle, this was the brightest light in the area;
- f. All Apollo lights had six globes;
- g. There was a fence and trees on the property where Malahle and her companions hid away, but Malahle maintained that they were not high enough to obstruct her line of vision in observing the shooting of the deceased at the time of the incident.

17. It merits mention that the Malatjies never suggested to any of the state witnesses that any of the lights was not working on the night of the incident, nor, relying on their alibis, were they in a position to do so. In evidence, they conceded the existence of an Apollo light near the Café, and confirmed that they frequented the Café on occasion.

18. After spending some time at Jam Alley Tavern on that evening, Malahle, Shai and Mametja were walking along the tarred road at about 20h00 approaching the T-junction near the Café when they saw about five men running away from the Café, towards them. Malahle was walking a short

distance away from her companions, in front of them. Malahle was not drunk at the time. Her evidence that she does not drink alcohol was uncontested.

19. The Café was about 81 metres from the T-junction. The deceased was parked on the gravel road near the T-junction and he was standing next to his vehicle. Based on the inspection in loco, when she first saw the appellants, Malahle was about 91 metres away from them, and they were facing her, coming towards her.

20. She testified that she knew and recognised the appellants, having lived in the same area as them for about three years. The appellants admitted that they knew her.

21. Shai and Mametja had also known the appellants for several years. However, each of them saw only one of the appellants and they were unable to identify which of the two appellants they saw, the appellants being identical twins. It merits mention that Shai and Mametja witnessed a moving scene at the time, and this may have caused their confusion. Mametja also identified Maboko (or Sello), (the deceased accused 3), at the scene.

22. Malahle heard gunshots, and she heard Ronnie and Ralph Malatjie calling to their co-assailants, by the names "Sello" and "Rodney", whom Malahle did not know. All of the men alighted the car with the goods they had been carrying and they drove off.

23. Malahle, Shai and Mametja were hidden away on a nearby property about 17 metres away from the deceased's car when they witnessed the shooting. Malahle said she saw Ronnie and Ralph approach the car. From Malahle's viewpoint, visibility was good owing to the bright Apollo light and lights on the property, and her view was unobstructed.

24. After phoning her boyfriend after the assailants had left the scene, he came to fetch her. Her companions left on their own. She proceeded to

Madzite tavern with her boyfriend. Outside the tavern, she saw the deceased's vehicle but could not identify its occupants.

25. The deceased's vehicle was recovered and inspected by the police on 20 October 2007. Lieutenant Colonel Galeke Raseasala ("Raseasala") testified that on the day after the incident, while with Constable Chauke, a cellphone was found in the front passenger seat of the vehicle. It was a Siemens A50. He returned a missed call on the phone and was told by one Clement who answered that the phone belonged to Esther Malatjie. Esther arrived at the police station and identified the phone as hers. She could recall the exact phone number of her phone and this was confirmed by Raseasala, who thereupon handed the phone to her.

26. The State's evidence revealed that, on 20 October 2007, one day after the incident, Ralph Malatjie arrived at the home of his girlfriend, Sarah Nkgapele ("Sarah"), who was in the company of her sister, Doreen Nhlapele ("Doreen"). Doreen had apparently been the girlfriend of Ronnie Malatjie. Ralph told Sarah and Doreen that he had been involved in the robbery and murder the previous night.

27. In the words of Sarah, Ralph Malatji told her and Doreen that:

"they had killed a certain teacher, a certain foolish teacher. Then we enquired as to where they did kill him. Then he said we were from Nomatata and he had gone there to rob and they were successful. They found the foolish teacher parked a car outside waiting there..... We approached him and pointed a gun at him and instructed him to hand over his car keys....he refused and then they killed him."

28. Ralph told Doreen that he had been given cellphone vouchers by Sello. Sarah also testified that Ralph had asked her to provide him with an alibi for the night of 19 October 2007. The making of these statements was baldly denied by the Malatjie brothers.

29. While it is correct that Sarah and Doreen did not report the statements to the police immediately, this does not vitiate their credibility and reliability.

The inference that they may have been fearful to do so, considering the nature of the information, is reasonable.

30. We turn to the alibi evidence advanced by Ralph Malatjie. He said he was at the Pepsi/Thibani tavern for the entire evening. His girlfriend Sarah and her sister Doreen said that he left at about 19h00 that night. Sarah saw him walking in the direction of the Café. Sarah confirmed that he returned to the tavern at about 21h00 that night. The tavern was about 500 to 600 metres away from the Café. He was absent for about two hours. The tavern is in close proximity to the Café. Two hours afforded him enough opportunity to commit the offences and return to the tavern. Ralph Malatjie later phoned Sarah to ask her and Doreen to provide him with an alibi for the entire period.
31. Ralph Malatjie testified that one Tebogo was with him that night as well as some other people, but he failed to call their evidence to support this.
32. Ronnie Malatjie said his wife was ill on the night, and he was visiting her in Gabasa at the time. Her mother and other people were present at the house. Neither his wife (who had since left him and gone to live with her sister, but who could have been served with a subpoena), did not testify. Nor did her mother or any of the other people present that night testify for Ronnie. There was no corroboration for his alibi.
33. When analysing the evidence, cognisance should be taken of safeguards which provide consistencies on material facts germane to the offences in question.
34. It was undisputed that a robbery occurred at the Café and was witnessed by seven employees of the Café, albeit that they could not identify the assailants. They were aware that there were a number of them. They confirmed that cellphone vouchers, cigarettes and money were stolen from the back of the bakkie in which they were to be transported.
35. Morema followed them but when he heard gunshots he stopped his pursuit and ran back to the Café. He saw a group of people holding the

deceased while they shot him. He could not identify who had shot the deceased. Plainly, the deceased's car was to be used by the assailants as their getaway car.

36. Both appellants were identified by an eye witness (Malahle) who knew and recognised them from her neighbourhood. She was facing them when she saw them leaving the Café and when they began to approach her and Shai and Mametja. Morema, who followed the assailants as they ran away with the stolen goods, also heard gunshots. He saw the assailants holding a man standing near a vehicle and shooting him. At this juncture he decided not to follow them. His evidence directly corroborates the shooting of the deceased just after the Café robbery, the shooting being by the same assailants who had perpetrated the robbery and whom he had followed for a short while until he saw the shooting.

37. Importantly, there was further eye-witness identification, albeit of lesser probative value than that of Malahle's. This was because Malahle's companions, Shai and Mametja, recognised one of the twins but could not confirm which one of the twins they saw. This was an excusable mistake considering the fact that they were identical twins.

38. The theft of goods from the bakkie at the Café was corroborated by Malahle, Shai and Mametja because they all saw the assailants running from the Café with goods and bags in their possession.

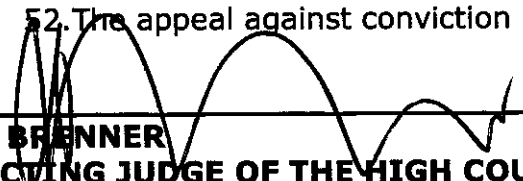
39. Mahlale heard gunshots after the appellants had reached the vehicle, and this alarmed her and she and her companions decided to hide away near a toilet at a house at about 17 metres from the deceased's vehicle. The opportunity for observation was conducive to accurate identification. Mahlale first saw the appellants running towards her on the road, she then saw them approaching the deceased's car and she heard gunshots when they arrived near the car. When she hid away, she could still see them because of the bright Apollo light in the area, and the lights on at the property, and her line of vision was unobstructed.

40. The location of Esther Malatjie's cellphone in the deceased's vehicle one day after the incident is an important fact which links the perpetrators of the robbery at the Café with the perpetrators of the murder of the deceased.
41. Ralph Malatjie later voluntarily and without solicitation stated to Sarah that he had been involved in the robbery and murder and this statement was made in the presence of her sister, Doreen. He had even offered cellphone vouchers to Doreen, informing her that Sello had given them to him. Sello's name had been called out when the Malatjie brothers were at the deceased's vehicle. Ralph Malatjie had even asked Sarah to provide him with an alibi for the period during which the offences were committed.
42. The alibi evidence of the appellants was cause for circumspection, deficient in material respects and fell short of being reasonably possibly true. Ralph Malatjie's alibi was directly controverted by the evidence of Sarah and Doreen. They testified that they were with him at the Pepsi tavern on the evening of 19 October 2007, but they testified that he left at 19h00. Sarah saw him walking in the direction of the Café, which was close to the tavern. Sarah testified that Ralph only returned to the tavern at 21h00, affording him two hours within which to commit the offences. The offences were committed between circa 20h00 and 21h00.
43. The state witnesses who were employees at the Cafe confirmed that the robbery occurred at about 20h00 when the Café closed. The murder occurred very shortly after that, on the versions of Malahle, Shai and Mametja, and the deceased's stolen vehicle was seen at another tavern shortly afterwards by Malahle. Tebogo, who was allegedly present with Ralph at the tavern during this period was not called to testify.
44. The alibi evidence of Ronnie Malatjie was uncorroborated. His wife, her mother and other unidentified people who were at his wife's home in Gabasa, were not called to give evidence to corroborate his version.

45. There were various discrepancies and inconsistencies between the versions of the state witnesses and ex tempore statements made by them. It is axiomatic at law that statements made to the police do not constitute definitive testimony of all material evidence, and that human fallibility in the recollection of events has to be factored into trial proceedings, a fortiori where there is a substantial time lapse between the event and the date when vive voce evidence is given.
46. Inconsistencies are frequently proof of the fact that witnesses have not expediently designed their evidence so as to dovetail their versions. The state witnesses were, on the whole, ingenuous in any errors made by them, but, in the final analysis, none of the inconsistencies nor errors was material in nature and did nothing to disturb the successful discharge by the State of its onus of proving guilt beyond a reasonable doubt. See in this regard **S v Oosthuizen 1982(3) SA 571 TPD at 576 G-H.**
47. It was uncontested that the appellants did not possess a licence to possess a firearm. Joint possession of a firearm was firmly established in casu, so the fact that it was unclear which one of the assailants shot the deceased is irrelevant to the enquiry.
48. The group of assailants, including the appellants, jointly possessed the firearm in common purpose with one another on the established facts. See **S v Mbuli 2003(1) SACR 97 (SCA).**
49. On a conspectus of the evidence in its totality, there is no basis upon which this Court can find that guilt on the counts in question was not established beyond a reasonable doubt. There were a plethora of consistencies in the evidence which resulted in the case against Ronnie and Ralph Malatjie being overwhelming.
50. There was no material misdirection on the facts, and the conclusions predicated thereon were correctly drawn.

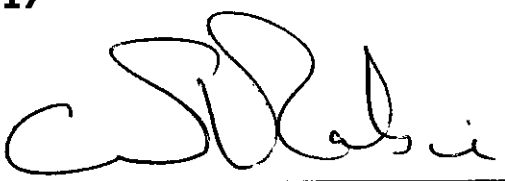
51. The versions advanced by the appellants in their defence were inherently improbable and were not reasonably possibly true. The appeal against conviction must fail.

52. The appeal against conviction is dismissed.



T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
14 March 2017

We agree.



P RABIE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



R TOLMAY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It is so ordered.

Appearances

For the Appellant:	Adv L M Manzini
Instructed by:	Polokwane Justice Centre (Legal Aid SA)
Counsel for Respondent:	Adv K H van Rensburg
Instructed by:	The Director of Public Prosecutions