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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A684/13

DATE: 5/5/2017

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

In the matter between:

SABELO NCALA

1st APPELLANT

THULANI ELIAS MAGABA

2nd APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

RAUUNGA, J

1. This is an appeal against both conviction and sentence. The appellants and two other accused were charged with four counts in the High Court, before Mothele J. They were all legally represented during the trial as well as the application for leave to appeal. The appeal is with leave of the trial court.

2. The appellants were convicted on 4 December 2012 of the following counts:

- 2.1 Count 1: Murder;
- 2.2 Count 2: Robbery with aggravating circumstances;
- 2.3 Count 3: Possession of a firearm without a license; and
- 2.4 Count 4: Possession of ammunition.

3. On 5 December 2012, they were each sentenced as follows:

- 3.1 Count 1: 20 years imprisonment;
- 3.2 Count 2: 15 years imprisonment;
- 3.3 Count 3: 5 years imprisonment; and
- 3.4 Count 4: 3 years imprisonment.

The sentences in Count 2, 3 and 4 were ordered to run concurrently with an effective sentence of 20 years imprisonment.

4. The appeal before us is only on behalf of Accused 2 and 4, to whom I will refer as first appellant and second appellant respectively. The first Accused in the trial filed a letter indicating that he is not proceeding with his appeal. The appeal of the third Accused was struck from the roll on the 24 April 2015.

5. It is common cause that when the trial commenced, the court a quo explained to the appellants the implications of sections 51(1) and 51(2) of Criminal Law Amendment Act 105 of 1997 ("the CLAA"). Further, the appellants and their co-accused pleaded not guilty to all the four counts and offered no plea explanation, having elected to exercise their right to remain silent in terms of the Constitution of the Republic of South Africa.

6. The events that unfolded on the 29 November 2007 leading to the incident are captured in the evidence of the witnesses who testified in the trial.

7. Finkana Rykman Mogotlhwane testified that on 29 November 2007 he was in the company of the deceased James Ngobeni, who was driving a Volkswagen Citi Golf blue in colour, with registration number [V...]. As they were driving around, they picked up the deceased's girlfriend one Nomshado and proceeded to the street where Nomshado stayed next to Engen Garage. The deceased parked the vehicle on the street. At that stage he disembarked leaving the deceased and Nomshado in the vehicle busy talking. While he was standing outside the vehicle he saw four boys approaching in their direction. One of them changed direction and turned right on the side of the deceased who at that stage

was with Nomshado also outside the vehicle. Three of the boys came to him and one went to the deceased. He was standing about five metres from the deceased when he heard a strange sound of a click. One of the three boys who came to him went behind him and the other two stood further away towards where the deceased was. The boy behind him pushed him on the spine with an object which at that time he thought was a firearm towards the direction of the deceased. He then heard some cracking sounds from the direction of the deceased and ran to the nearby yard. He knocked on the door while the cracking sounds continued.

8. It was at that moment that a person came out of the house and as he joined him on the veranda Mogotlhwane noticed that it was now silent and all he could see was the vehicle in which they were travelling moving slowly down the street until it stopped as a result of some electrical cables. He noticed that there was no one in the vehicle.

9. Mogotlhwane further testified that he and the person that came out of the house went to the scene and as he approached he saw the deceased on the ground with a firearm next to his arm. He saw a wound on the forehead of the deceased and requested the person who was with him to call an ambulance. Thereafter he noticed a police vehicle that had arrived and at that moment members of the community as well as passing motorists were gathering around the scene. According to him the incident occurred at about 19h30.

10. He further testified that although it was dark there was sufficient illumination from the Engen Garage as well as various lights from the households in the vicinity. He later was able to identify one of the assailants at an ID parade which was held on 20 January 2008. He identified Accused no 1 as one of their attackers and that it was Accused no 1 who had earlier pointed a firearm at him from behind. This is the person that he later saw that evening at the scene lying on the floor with his trousers covered in blood. At the time he was accosted with a firearm he lost his cellphone, a Nokia 3310 which was later found by the police where the assailant was lying.

11. Nomshado Constance Mnguni the deceased's girlfriend, corroborated the testimony of Mogotlhwane in regard to the evidence as to how the incident at the scene unfolded. She further testified that the one assailant who came to the side where she stood with the deceased pulled out a firearm which he pointed at them and demanded their cellphones and her bag. The assailant demanded car keys from the deceased. Soon after that she heard a gunshot but did not see who fired that shot. She however noticed that their assailants were shooting. In the midst of that confusion she saw Mogotlhwane running to a nearby house and she ran after him. When she got into the premises she went to the outside room and hid herself there. She only came out after she heard people talking and she was told by one person from that house that she has been shot. It was at that point that she realized that she has been shot on her right hand and her right thumb was numb and no longer functioning properly. She went back to the scene and noticed the deceased was lying down a distance from the spot where she was standing with him. The vehicle had shifted from where it stood and the police had arrived with an ambulance. She was taken to the clinic. The items that were taken from her were recovered. At the identity parade she could not identify anybody.

12. Ida Ntshabeleng Masemola testified that on the 29 November 2007 she and her boyfriend Mzwakhe Mashiloane were at Mzwakhe's home when at about 20h00 they heard a knock on the door and Mzwakhe went to open. This is the witness who earlier in her testimony had deviated from her police statement. However, after she was declared a hostile witness she then admitted that she deposed to the statement and what she said is the truth.

13. She continued to testify that Sabelo, referring to the first appellant, came into the room. She also observed that there were other boys outside the house. It would later transpire that the said people were third Accused and the second appellant, Calvin and Thulani.

14. The second appellant explained to them that they shot a police officer, referring to the

deceased, because they wanted to take his vehicle. In her statement she also said that the second appellant told them that it was the first appellant who shot the deceased. The first appellant in turn said that it was the second appellant who shot the deceased. She further testified that although she was assaulted by the police, this did not influence her when she made the statement to the police. She also witnessed the police assault the first and second appellant, Calvin and Mzwakhe.

15. Mzwakhe Mashiloane, Ida's boyfriend, corroborated Ida Masemola that the first appellant knocked on the door while they were sleeping and requested a key for another room which Mzwakhe handed to him through the window.

16. Mzwakhe was also confronted with a statement he made to the police from which he tried to deviate. In his statement he had never said that he was assaulted by the police, this he only said when he was testifying in court. However, he went on to corroborate the evidence of Ida as to what happened on that day including the fact that Ida, himself, Calvin, the first appellant and the second appellant were arrested by the police.

17. Joseph Shabangu testified that on that fateful night at about 20h00, Lucky and Calvin arrived and he opened the door for them. And they went to sleep. Early in the morning they were woken up by the police who were looking for Calvin. The police searched the room and found the firearm in the room where Calvin and Lucky were sleeping. When the firearm was discovered he was outside at the door and did not see exactly where it was found. He further testified that there was no firearm in the room before Lucky and Calvin arrived.

18. The deceased's uncle one Lesiba Loyd Ledwaba testified that he was called to identify the deceased as well as the deceased's property, being a cellphone, debit cards of FNB and Truworths and other cards that bore the deceased's name. His evidence was not disputed.

19. Lesiba Loyd Ledwaba a Sergeant in the South African Police Service testified that he

and his colleague Constable Kgaladi were summoned to the scene of the incident and when they arrived they were alerted to a wounded person who was hiding in the premises of a house near the scene. They went to the premises of the house and found the person hiding behind a dustbin covering himself with plastic. When Kgaladi removed the plastic the person asked not to be shot and spontaneously said that it was Sabelo who shot the policemen, i.e. the deceased. They then informed the person of his rights and took him to the ambulance. He identified the person as Accused no 1, Thabang Joseph Ramasehla, who was still bleeding when they took him into the ambulance. It would later transpire that accused no 1 is the person that was shot by the deceased in a fight that ensued earlier.

20. Daniel Moerane Kgaladi corroborated Sergeant Ledwana in his testimony. He further said that when they questioned Accused no 1 he said that there were four of them and they wanted to take the deceased's vehicle. He also testified that he joined the search for the three other suspects and at Dennilton they found the first and second appellants. The two appellants were arrested by Lieutenant Colonel Ledwaba. Calvin, Accused no 3 was arrested by Captain Msiza at a different house nearby. During the arrest of the first and second appellants they found the deceased's wallet as well as his cards on the premises. Both Sergeant Ledwaba and Constable Kgaladi denied that the accused were assaulted.

21. Captain Msiza testified that during the arrest of Accused no 3 he recovered a firearm and during the arrest of the first and second appellants Lieutenant Colonel Ledwaba recovered a firearm. Captain Raphale Kasage corroborated the evidence of Captain Msiza. The evidence of Captain Msiza was also corroborated by that of Lieutenant Colonel Ledwaba. Constable Penwell Nhlapo was responsible for the collection of exhibits including the two firearms and ammunition which he sent to ballistics.

22. The state also called two ballistic expert witnesses to testify on the two firearms and the projectile. Lieutenant Carlo Malan testified that from the 10 December 2007 to 31 December 2007 the exhibits were kept under lock and key. Whereas Captain Zacharia

Makola testified that the firearm found in the room where the two appellants had been sleeping is the one that discharged the bullet at the scene of the crime.

23. It must be mentioned that earlier during the trial, a trial-within-a-trial was held and that judgment appears on the record. It must also be mentioned that the application for the discharge of Accused no 1 in terms of Section 174 of the Criminal Procedure Act was refused.

24. There is no need to repeat the evidence of Accused no 1, which is on record, because he was not before us. However, he put himself on the scene in that he testified that when shots were fired he fled to the nearby house and hid himself there. He realized that he was shot in the hand. He did not know the first appellant nor did he tell the police that it was the first appellant who shot the deceased.

25. It is however prudent to note that Accused no 1's witness one Duduzile Mahlangu, *inter alia*, testified that on 29 November 2007 at about 20h00 she heard a shot being fired and saw a car speeding on top of a person. She also saw the police arrest Accused no 1 who was hiding behind a dustbin. She confirms that there were lights illuminating the scene of crime. However the evidence of the second witness for Accused no 1 is not helpful.

26. The first appellant testifying on his behalf said that on the 29 November 2007 he was at home in the company of his younger brother who was 12 years of age at the time. At about 19h00 it was dark and he left home to a place called Sobanto which is a distance away from his home. When he returned at about 20h00 he realized that the house was locked. He knocked on the window of the house and his cousin Mazwandile gave him the key to an outside room. He then saw two boys entering the premises one of them was Christopher. He agreed to give them a place to sleep on condition they leave in the morning. The second appellant is the other boy who was in the company of Christopher, he did not know the second appellant at that time. He slept in a separate

room at the back of the main house with his brother.

27. While they were asleep the police arrived and kicked the door open and entered the room. This was the morning of 30 November 2007. The police assaulted him as well as Christopher and the second appellant. The police said they were looking for firearms. After the police searched the house he did not see any firearms and it was only when they were at the police station when the police told him that they found a firearm at his parental home. He was made to sign a document at the police station but the contents thereof were not explained to him. He denied under cross examination that he possessed a firearm. He also denied knowledge of a police wallet that was found on the premises of his home. He was further assaulted by Captain Tswai because he was forcing him to make a statement to implicate the other accused and himself.

28. Accused no 3 testified that he was arrested by the police on the 30 November 2007 at Jabu's parental home. The police dragged him to the outside of the house and assaulted him. He only met the other accused at Siyabuswa the following day i.e. Accused no 1 as well as the first and second appellants. He did not see any firearm that was recovered by the police in the room where he slept. The rest of his evidence is on record and as Accused no 1, he too was not before us when the appeal was heard.

29. The second appellant, Thulani Magaba testified that on 29 November 2007, he was at Motete in the company of Christopher, whereafter they proceeded to Dennilton to Christopher's girlfriend's place. They later proceeded to the first appellant's place who offered them a place to sleep in a separate room. In the early hours of the morning the police arrived and woke them up. When they were taken outside the room they found the first appellant on the ground, who was beaten up by the police. The police demanded a firearm but he did not know anything about it. A firearm was shown to him the following day at Dennilton police station. The police told him that the firearm was found where they were sleeping.

30. Christopher Dingane Mvelo corroborated the evidence of the second appellant with the exception that certain contradictions were identified in their testimonies. This include amongst others, when they went to Dennilton Christopher testified that they took nappies, milk and clothes. The second appellant testified that milk was bought later after they had delivered other items. When they arrived at Christopher's girlfriend's place, the second appellant testified that they found the girlfriend and the baby there and stayed there for a while, while Christopher testified that when they arrived he left the second appellant somewhere and went to the house alone. Christopher testified that after his girlfriend had arrived he stayed there for two hours while the second appellant was at the shops and he later joined him there. The second appellant on the other hand testified that throughout he was in the company of Christopher even when they went to go and buy milk together.

31. The issues pertaining to assault on the appellants and their co-accused including the question of the pointing out and the making of statements were dealt with by the Court a quo in its judgment in the trial-within-a-trial, as well as in the main trial. Finally, the court a quo decided these issues in favour of the appellants and their co accused. This matter must be left to rest.

32. It is trite law that the state is required to prove its case beyond reasonable doubt and that in deciding whether such onus has been discharged or whether there is reasonable doubt in which case the accused, would be entitled to an acquittal, the trial Court must "weigh up all the elements which point toward 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 weights so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt". *S v Chabalala* 2003 (1) SACR 134 (SCA) at 1391 - 1400. Put differently, a court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the

evidence - S v Van der Meyden 1999 (1) SACR 447 (W) at 449 h.

33. Counsel for the appellant seem to harp on the pointing out and statements made by the first and second appellants which were later ruled inadmissible by the Court a quo in its judgment. These aspects were properly distilled in the assessment of the evidence and the impact of the assault on the appellants by the police. The Court a quo also dealt with the issue pertaining to the statement made by Accused no 1 which evidence cannot be imputed to the other accused. The Court a quo correctly relied on the balance of the evidence tendered by state witnesses as well as the appellants themselves.

34. Importantly, the state avers common purpose in its summary of substantial facts, which forms part of the indictment. Snyman Criminal Law 4ed at 261, points out that "the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others". In practice the doctrine finds application in a variety of crimes other than murder and these include treason, public violence, robbery, housebreaking, unlawful possession of a firearm, assault, theft and fraud Snyman (supra) at 262. This doctrine was extended and confirmed in S v Mgedezi 1989 (1) SA 687 (A) and Thebus and Another v The State 2003 (6) SA 501 (CC).

35. I have no doubt in my mind that in the instant case, the appellants acted in common purpose because, they were present on the scene; they were throughout making common cause with the group because they were travelling in the same vehicle including the gunmen, and they acted in association with them by robbing the victim and killing the deceased. Moreover, Accused no 1 placed the appellants on the crime scene when he revealed their identities to the police. It is also important to mention at this stage that the Court a quo correctly concluded that what Accused no 1 said to the police was not an admission but a denial. However, in trying to exonerate himself from the commission of the crimes, he revealed the identities of the other assailants and there implicating them in the

commission of the crimes, which confirmed participation and association. The Court a quo succinctly dealt with this aspect.

36. It seems to me that the Court a quo only ascribes the defence of alibi to the second appellant. However, the record reveals that the first appellant raises a total denial of any knowledge of the murder and robbery. This to me is tantamount to an alibi because he refused to place himself on the scene. Similarly the defence of alibi applies to him as well. Counsel for the appellant when asked about the late disclosure of an alibi did not respond.

37. The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognized in our common law - *R v Mashelele* 1944 AD 571. As such, it is a law of general application. However, like all law, common law must be consistent with the Constitution.

38. It has been held by the Constitutional Court that the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi. The absence of a prior warning is, a matter which goes to the weight to be placed upon the late disclosure of an alibi. Where a prior warning that the late disclosure of an alibi may be taken into consideration is given, this may well justify greater weight being placed on the alibi than would be the case where there was no prior warning. In all the circumstances, and in particular, having regard to the limited

use to which the late disclosure of the alibi is put, the Court found that limitation to alibi defence is justifiable under section 36(1) of the Constitution. The failure to disclose an alibi timeously is therefore not a neutral factor. Depending on the circumstances of each case, it may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. See *Thebus* (supra) paras [65], [67] and [68].

39. In the first place, the version of the first appellant is that on the 29 November 2007, he

was at home and only left at 19h00 for Sabantu. He went back home at about 20h00 before proceeding elsewhere. According to him this was a clear indication that he was not on the scene that fateful evening because the incident occurred at or about 18h00.

40. Secondly, the first appellant denies that he was in the company of Accused no 1 at the crime scene. He also denies that he was at the scene at all. Evidence of state witnesses points to the fact that the first appellant was on the scene whether through direct evidence or inferentially. Although direct prior warning was not given, the questioning by the prosecutor about his whereabouts on that day was a clear warning for him to disclose the truth (why the firearm found in his possession was linked to the commission of the murder is proof that he was on the scene). This also applies to the second appellant who also was questioned about his presence at the crime scene. There is no need for this Court to deal with this aspect in detail because, the Court a quo dealt with in its judgment.

41. In my view, there are three sets of evidence presented by the state in support of its case for the conviction of the appellants. The evidence of Finkana Rykman Mogotlhwane is corroborated by Nomshado Constance Mnguni regarding the attack on them and the killing of the deceased as well as the recovery of the stolen items. Their evidence pertains mainly to what happened at the scene of crime. The Court a quo correctly accepted the evidence of these two witnesses as being credible.

42. The evidence of Ida Ntshabeleng Masemola and Mzwakhe Mashiloane is relevant to the information they got from the first appellant concerning the killing of the deceased, that "he was killed because they wanted to take his vehicle". When the first appellant was talking to Mzwakhe, Ida overheard the conversation that is the reason she corroborated Mzwakhe in his evidence. Their evidence is also relevant to the place where the appellants were found. Whereas the evidence of Joseph Shabangu is relevant to the place where Accused no 3 was found. Although Ida and Mzwakhe during the trial attempted to deviate from the portion of their statements which implicated the Accused, mainly the second

appellant, the Court a quo however correctly accepted their evidence as being credible and reliable.

43. The third set of evidence pertains to the police officers inclusive of the experts who testified about the arrest of the appellants and their co-accused. The evidence of the experts in particular the ballistic experts,- in the main links, the appellants to the commission of the offences. The Court a quo correctly rejected the version of the appellants regarding their alibi defence and accepted the overwhelming evidence of the state that they are implicated in the commission of the offences. Both of them were found in possession of a firearm which was directly involved in the killing of the deceased. They were also linked to the commission of the crimes through the doctrine of common purpose. They were also found in possession of the deceased's bank cards and wallet.

44. Lies can generally be used to discredit the accused's testimony but not to infer guilt. In this regard a distinction can be drawn between 'credibility lies' and 'probative lies'. See an article by B. C. Naude: "The Probative value of Post-offence Conduct Evidence" (2012) Vol 332 Orbiter 320 at 330.

45. In *Zonette v R* [2000] 200 [CLR 238] Kirby J explains the difference:

"The former are said to be those which, according to their content, affect the credibility of the accused's evidence and thus the weight which the jury may give to the other testimony of the accused. In this sense, a conclusion that the accused has lied upon one peripheral to the offence charged, may make the jury scrutinize with more care (perhaps skepticism) other testimony given by the accused. It might, in this way, contribute indirectly to rejection of the accused's version of critical events and the acceptance of that pronounced by the prosecution. Probative lies, on the other hand, are those which naturally indicate guilt. This is a "hard test" precisely because it is rare that a lie about a particular matter will be so crucial as of itself, if proved, to establish directly guilt beyond reasonable doubt."

46. The Court a quo made a credibility finding in the contradictions in the evidence of first appellant and second appellant. These contradictions are already on record in this judgment and there is no need to regurgitate same. Save to say that their contradictions amount to lies, which may be classified as 'credibility lies'.

47. There is overwhelming evidence on record by the witnesses of the state that a firearm was retrieved where the first appellant was sleeping which firearm is linked to one of the shells that was found at the scene of the crime and that firearm was discharged at the scene of the crime. In addition to that, the wallet of the deceased containing his bank cards and identity card were found on the premises where the first appellant lives. This is the same place where the second appellant was found in the company of the first appellant. To argue otherwise, will be an attempt to skew the proven facts. The submission by the appellants cannot be sustained.

48. This accords with the decision in the oft cited case of R v Blom 1939 AD 188, in which the Appellate Division (as it then was) set out two cardinal rules in relation to inferential reasoning. The first is that the inference sought to be drawn must be consistent with all the proved facts and should be such that they exclude every reasonable inference save the one sought to be drawn. These two cardinal rules were followed in deciding the guilt of the appellants in this case.

49. It is trite that in the absence of demonstrable and material misdirection by the trial Court, its finding of the facts are presumed to be correct and will be disregarded if the recorded evidence shows them to be clearly wrong. When asked to point out to the Court if there are any material misdirection in the judgment of the Court a quo, Counsel for the appellants conceded that there are none.

50. Having considered all the components and having regard to the strength and weaknesses, probabilities and improbabilities on both sides, in the light of the judgment of the Court a quo, I am convinced that there are no material misdirections in its findings.

In my view the Court a quo correctly found that the state proved its case beyond a reasonable doubt.

51. As appears on the record, the appellants and their co-accused were each sentenced to 20 years, 15 years, 5 years and 3 years imprisonment on count 1, 2,3 and 4 respectively.

When counsel for the appellants was asked if indeed she is pursuing the appeal on sentence, her submission was that the appellants would rather withdraw the appeal against sentence. In the light of this submission, there is no need to interfere with the sentence imposed by the court a quo.

52. In the circumstances, I make the following order:

52.1 Appeal against both conviction and sentence is dismissed.

T.J RAULINGA

JUDGE Of THE GAUTENG DIVISION, PRETORIA

I agree

R.G TOLMAY

JUDGE Of THE GAUTENG DIVISION, PRETORIA

I agree

N.V KHUMALO

JUDGE Of THE GAUTENG DIVISION, PRETORIA