



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO. AR339/2016

In the matter between:

**THAMSANQA GOODENOUGH MTHEMBU
THULANI CYRIL KHUZWAYO**

**FIRST APPELLANT
SECOND APPELLANT**

and

THE STATE

RESPONDENT

J U D G M E N T

NKOSI AJ

[1] This is an appeal by the first and second appellants against both their convictions and sentences for crimes committed on two separate occasions. According to the indictment, the appellants were charged with a total of six counts. These included the murder of one Subusiso Welcome Mbatha (“Mbatha”) committed on 21 April 2005, the robbery of Mbatha with aggravating circumstances committed on the same date, the murder of one Mthunzi Almon Mlambo (“Mlambo”) committed on 21 April 2005, the robbery of Mlambo with aggravating circumstances committed on the same date, as well as the unlawful possession of a firearm and ammunition.

[2] Both appellants pleaded not guilty to all charges preferred against them. The first appellant elected to remain silent and put the state to the proof of all charges

preferred against him. The second appellant, on the other hand, instructed his attorney that he could not specifically recall where he was on the dates when the aforesaid offences were committed, but denied that he committed any of the offences with which he was charged.

[3] Prior to leading evidence to prove the charges preferred against the appellants, the prosecutor addressed the court in terms of section 150 of the Criminal Procedure Act 51 of 1977 ("the Act"). In his address, the prosecutor stated that in proving the charges preferred against the appellants, the state would rely on circumstantial evidence as there were no eye witnesses to the commission of the crimes with which the appellants were charged. Instead he said, the appellants were linked to the commission of such crimes by certain items identified by witnesses as belonging to the two deceased, namely, Mbatha and Mlambo.

[4] After hearing the evidence presented by various state witnesses against them, each appellant decided to testify on his own behalf. Starting with the first appellant, his evidence was essentially the denial of any involvement in the commission of the crimes with which he was charged. Instead, he pointed a finger at his co-accused. Although he admitted to having been present when certain goods belonging to the two deceased were sold, he denied having played an active role in the sale of the goods concerned. This was notwithstanding the damning evidence by the purchasers of such goods,¹ which collectively put the first appellant at the very centre of the illicit sale transaction of the stolen goods.

[5] Further evidence linking the first appellant to the commission of the offences with which he was charged were the black bag, certain clothing items and compact disks found in his room.² These were positively identified by one of the state witnesses as belonging to one of the deceased, Mlambo. This was expressly admitted by the first appellant in his evidence,³ although he claimed to have received the said items as gifts from the second appellant.

¹ Pages 27-28 of the appeal record; page 58 of the appeal record; pages 61-65 of the appeal record

² Evidence of Xalani Xaba, pages 175-176 of the appeal record

³ Page 210 para 20 of the record

[6] In addition to the above, one of the state witnesses⁴ had also testified that both appellants had come to his place in the deceased, namely Mlambo's vehicle to collect their ill begotten loot from the sale of the car speakers and the sub-woofer that were stolen from the same car. Although this was denied by both appellants, the cumulative effect of such evidence was found credible by the trial court, and was taken into account by that court in convicting both appellants for the murder of Mlambo.

[7] In my view, the fact that the first appellant was not in possession of the murder weapon does not in any way exonerate him from the murder conviction, particularly, in the light of the evidence by one of the state witnesses that he was the one who led the police to its location at the second appellant's house. Taken cumulatively with other evidence, his knowledge of the location of the murder weapon could not simply be ignored by the trial court. It was yet another to the chain of items linking the first appellant to the murder of Mlambo.

[8] Therefore, having considered in its totality the amount of evidence led by the state against the first appellant in the trial court, I am satisfied that the trial judge had correctly found the first appellant guilty of murder as set out in count 3 of the indictment in respect of the deceased, Mlambo. The same applies to the first appellant's conviction of the other crimes as set out in counts 4, 5 and 6 of the indictment.

[9] This brings me to the second appellant's testimony before the trial court. Faced with the overwhelming evidence by the state witnesses linking him to certain items belonging to the deceased, Mbatha and Mlambo, the second appellant did not deny knowledge of such items, or his possession thereof at some stage after the murder of the deceased. Instead, he alleged that he, together with the first appellant, had acquired the said items from a certain Bongani Nzama, who allegedly requested their assistance in either selling the items, or collecting payment from the purchasers thereof. For some inexplicable reason, the second appellant did not call Nzama to corroborate his evidence.

⁴ MD Mkhize, page 30 of the appeal record

[10] In response to the questions posed to him by his attorney regarding the evidence given by the first appellant implicating him which, in essence, was to the effect that he alone sold the goods belonging to the two deceased and gave some of them to the first appellant as gifts, the second appellant had repeatedly stated that the first appellant was lying to the court. He testified that the first appellant had admitted to him that he was induced by the police to implicate him in the commission of the offences with which they were charged, and promised to release him in return. This was denied by the first appellant.

[11] Just like the first appellant, the amount of evidence linking the second appellant to the commission of the crimes with which he was charged and convicted was simply overwhelming. Firstly, he was positively linked to the murder of Mlambo by the keys to Mlambo's vehicle found in his room, as well as the compact disks which were positively identified by witnesses as belonging to Mlambo. This, taken cumulatively with the evidence that the firearm used in the murder of Mlambo was found at the second appellant's house, leaves me in no doubt that the trial court was, once again, correct in its conviction of the second appellant of the murder of Mlambo, as well as the other crimes set out in counts 4, 5 and 6 of the indictment.

[12] Of course, the circumstances are different with regard to the murder of Mbatha. In the absence of any evidence positively linking the first or second appellant to the murder of Mbatha, the trial court was correct in convicting both appellants in terms of section 260 of the Act of a lesser competent verdict of receiving stolen property, knowing it to be stolen. This is in the light of the credible evidence given by the state witnesses which linked both appellants to certain items or goods belonging to the deceased, Mbatha.

[13] With the leave to appeal in respect of count 2 having been refused by the court *a quo*, the first and second appellants' conviction for count 2 will obviously remain in place. Unfortunately, while their conviction of a lesser competent verdict may come as a relief to both appellants, that does not bring any closure to Mbatha's family, whose gruesome murder remains unresolved.

[14] Lastly, it is not clear from the appeal records as to whether either one or both appellants were also appealing against the sentences imposed by the trial court for the crimes for which they were convicted. In so far as it may be contended that this was the case, I am not persuaded that there is anything in this case which justifies this court interfering with the sentences imposed by the trial court against both appellants for the crimes for which they were convicted. In the circumstances, their sentences will accordingly stand.

[15] I propose that the following order should be made:

- (a) That the appeal be dismissed.
- (b) The convictions by the court *a quo* of accused 1 and 2 in respect of all counts are confirmed.
- (c) The sentences imposed by the trial court are confirmed.

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NKOSI AJ

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JAPPIE JP

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MNGUNI J

Appeal heard on : 30 January 2017

Counsel for the First Appellant : Mr PB Ndlela

Instructed by : Messrs P.B. Ndlela & Company

Counsel for the Second Appellant : Mr S Matthews

Counsel for the State : Mr J Du Toit

Instructed by : The Director of Public Prosecutions

Judgment handed down on : 06 February 2017