

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION : MTHATHA

CASE NO. CA 18/16

In the matter between:

NDUMISO SOYIZWAPHI

Appellant

and

THE STATE

Respondent

FULL BENCH APPEAL JUDGMENT

GRIFFITHS, J.:

[1] The appellant in this matter was convicted of three counts of murder by the Eastern Cape High Court, Mthatha (Miller J), and sentenced on 15 December 2009 to life imprisonment on each count. Leave to appeal to this court against both the convictions and sentences was duly granted by Pakade J on 28 October 2015.

[2] The appellant was alleged to have murdered all three of the deceased on or about 4 March 2007, at or near Ngcobo. He pleaded not guilty to all three

counts and gave no explanation as to the basis for such pleas. It was alleged in the indictment, and apparently became common cause, that the deceased's ages were 2, 14 and 18.

[3] It was common cause that during the evening of 4 March 2007, a Sunday, the three deceased were shot and killed whilst in a shack in which they alone resided. Their father, one Howard Mhlanga ("Mhlanga"), lived in a separate shack a short distance away with his girlfriend, one Nosendikho Tyathula ("Nosendikho"). The appellant resided in a nearby shack.

[4] The crime scene was attended by members of the South African Police Service during the evening of 4 March 2007. In this regard, inspector Yekotya testified that a number of spent 9 mm cartridges were found and were recovered by the police inside the shack in which the deceased were shot and killed. As a result of information received, and after securing the scene of crime, he went in search of the appellant whom he had been informed worked as a security guard at a certain Sasol garage in Ngcobo. He arrived at such garage between the hours of 20H00 and 21H00 the same night but, despite inquiries, was unable to find the appellant there.

[5] According to inspector Yekotya, he continued his search for the appellant who was ultimately arrested on 15 March 2007 at approximately 06H00. Upon his arrest, the appellant was found to be in possession of a 9 mm Norinco automatic pistol. It is common cause that the appellant was indeed the licensed owner of such firearm.

[6] The state established, by way of ballistic evidence, that the cartridge cases found in the deceaseds' shack were indeed fired from the same firearm which was recovered from the appellant. This, the proximity of the appellant's

shack to that of the deceased and his apparent failure to remain at the scene after the deceased had been killed, constituted the circumstantial evidence upon which the state relied in its pursuit of a conviction against him. The state also relied on a certain statement allegedly made by the appellant, the admissibility of which was contested. After a trial within a trial, Miller J however found that such statement was inadmissible in those proceedings and it was accordingly not taken into account in determining the appellant's guilt.

[7] In response to the allegations of the state the accused testified that during the afternoon of 4 March 2007 Nosendikho had approached him requesting that he lend his firearm to her for her to hold during the course of that night as a form of protection. According to his testimony, the reasons given by Nosendikho were that her partner, Mhlanga, also a security guard, had recently secured a new job which took him further away from her and he was thus accordingly not sufficiently available to provide protection for her as he might previously have been. The accused further testified that he had previously requested her to lend him the sum of R500 as he was in desperate financial straits and that when Nosendikho requested the firearm, she further suggested that she give him the sum of R1000 and that he need only repay the sum of R500. Thus, in effect, she proposed that she hire the firearm from him overnight for the sum of R500.

[8] The appellant testified further that this proposal was acceptable to him and that he had duly handed the firearm over to Nosendikho during the course of the afternoon of 4 March 2007, whereafter he went to the Sasol garage in order to carry out his duties as a security guard from 18H00 to 06H00 the following morning. Furthermore, according to him inspector Yekotya had at no stage during the course of that night attended at the Sasol garage in search of him.

[9] Because of the fact that the appellant had not earlier in the trial alerted the state to the fact that his defence would be that Nosendikho had been in possession of the firearm during the crucial period when the deceased had been shot therewith, Miller J granted an application by the state to reopen its case and to lead the evidence of Nosendikho in this regard. Nosendikho denied the evidence of the appellant stating that whilst she and Mhlanga had seen the appellant cleaning his shoes during the course of that afternoon, they had not spoken with one another. She had never requested the appellant to lend his firearm to her and, indeed, she would never have done so as she was not proficient in the use of such a weapon. Furthermore, she testified that Mhlanga worked a day shift on 4 March 2007 and had thus been at home during the course of that evening. She therefore, in any event, had had no need of further security as testified to by the appellant.

[10] Miller J, correctly in my view, found that in order to determine the guilt, or otherwise, of the appellant, it was necessary for him to determine which of the appellant and Nosendikho was telling the truth. This was a question of the credibility of these witnesses. After a full analysis of their evidence, Miller J concluded that he could safely reject the evidence of the appellant and that the evidence of Nosendikho was satisfactory in every material respect and reliable. Based therefore on her evidence, he found that the accused had been untruthful in testifying that he had given possession of the firearm to Nosendikho before the deceased had been killed and that he must accordingly have been in possession thereof at the crucial time. As a matter of inference, based on the well-known dictum in **R v Blom**¹, he concluded that the state had, on this evidence, established beyond a reasonable doubt that the appellant was indeed guilty of these crimes.

¹ 1939 A.D. 108 at 202 – 203

[11] Mr. Mgcotyelwa, who appeared on behalf of the appellant, has urged us to find that the court *a quo* was wrong in rejecting the evidence of the appellant. He argued that the trial court ought to have found that the appellant's version was, at the very least, reasonably possibly true and that, on this basis, he was entitled to his acquittal.

[12] It is opportune at this stage to restate the trite principles governing the hearing of appeals against the findings of fact. These were succinctly set out by Jones J in the matter of **S v Leve**² as follows:

“The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court’s findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court’s findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. See the well known cases of *R v Dhlumayo and Another* 1948(2) SA 677 (A) at 705 and the passages which follow; *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645; and *S v Francis* 1991 (1) SACR 198 (A) at 204c-f. These principles are no less applicable in cases involving the application of a cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.”

² 2011 (1) SACR 87 (ECG) at paragraph [8]

[13] Furthermore, and of direct application to this case, are the comments of the Schreiner JA in **R v Dhlumayo**³ relating to the trial judge's advantage is in this regard:

"5) The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.

(6) Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial."

[14] Applying these principles to the present matter, it is necessary for this court to consider whether or not the findings as to the relative credibility of the appellant and Nosendikho are either vitiated by irregularity, or are patently wrong. No question of an irregularity has been raised by the appellant and indeed in my perusal of the record I have not come across any. It thus behoves this court to consider whether or not these findings of Miller J were patently incorrect.

[15] I have closely examined the evidence of both the appellant and Nosendikho within the greater context of all the relevant evidence in this matter. In my view, it certainly cannot be said that the trial judge was wrong in his findings in this regard. The trial judge found that the evidence of the appellant was, in all the circumstances of this matter, so patently improbable that it could be rejected out of hand. He furthermore found that the evidence of the witness

³ 1948(2) SA 677 (A) at 705

Nosendikho was satisfactory in every material respect and that in his view she was a satisfactory and reliable witness.

[16] With regard to the evidence of Nosendikho, the trial court found that she "was in my view, a satisfactory witness. She answered all the questions put to her, in a forthright manner, and was not at all evasive". Miller J further stated that:

"The version given by Nosendikho was simple and concise and she was not in any way swayed from it, by cross examination. The accused's version on the other hand, is in my opinion so highly improbable that it may be rejected as being false."

[17] The trial court further reasoned that the inference to be drawn from the accused's version was that it must have been Nosendikho or someone else at her behest who shot and killed the deceased. The court found that it was most improbable that Nosendikho would have hired the firearm from the appellant had she intended to use it to murder the three children. The reason for this was that the father of two of those children, Mhlanga, was her live-in companion and he and the appellant were not only close neighbours, but were also friends. It was also found to be inconceivable that Nosendikho would simply hire the firearm from the appellant, almost immediately thereafter shoot the three deceased and then simply return the firearm to him the following morning outside the door of the shack which Mhlanga, the father of two of the children that she shot the previous evening, occupied. In the view of the trial court, "The risk of it being revealed that she hired the gun shortly before the killings, would be so high as to not even contemplate doing it."

[18] The trial court also pointed out that it would be most improbable, if the appellant's version were correct, that he would not have made a report to Mhlanga the following morning after the shooting of his children to the effect that his live-in partner, Nosendikho, had been in possession of a loaded firearm during the course of that night in somewhat unusual circumstances. It being common cause that the appellant and Mhlanga were friends, one would have expected the appellant in the circumstances to have made such a report.

[19] The trial court also pointed to certain contradictions in the evidence of the appellant, such as the fact that he said he was at his place of employment, namely the Sasol garage, from 18H00 to 06H00 the following morning. According to Inspector Yekotya, he had, on the evening of the killing of the deceased, repaired from the crime scene directly to the garage in search of the appellant, but had not found him. The court found Inspector Yekotya to be a satisfactory witness and that his evidence was truthful and reliable.

[20] In addition to the foregoing, in my view there are certain other improbabilities in the evidence of the appellant. It was Nosendikho's uncontradicted evidence that Mhlanga had worked a day shift on 4 March 2007 and had returned home early that evening. She also testified to the fact that her shebeen usually closed at 18H00 on a Sunday and that she had not experienced any serious trouble in or about the shebeen. As against this background, the appellant's evidence to the effect that Nosendikho required the firearm for this one particular night because Mhlanga was to be working far away during the course of the night and that she needed protection, held no water at all. There was, in my view, no basis whatsoever for Nosendikho to hire a firearm from the appellant in these circumstances and where, on her evidence, she had never used a firearm and had no idea as to how to use it.

[21] Then there was the further evidence elicited by the court from the appellant to the effect that when the firearm was returned to him by Nosendikho, it still had eight rounds in it, being the same number of rounds it had when he handed it to her. Once again, on the probabilities it is most unlikely that a person who possessed no proficiency at all in handling a firearm would have been capable of replacing the rounds which had been used when the children were killed.

[22] In my view all these factors cumulatively are a strong indication that the trial court's findings are unassailable. I am of the view that, taking all these matters into account, it cannot be found that the findings of the trial court were wrong, let alone palpably wrong. In the circumstances, the appeal against the convictions has to fail.

[23] Turning then to the question of sentence, the court *a quo* found that:

1. In view of the fact that the three minor children were murdered by being shot whilst they were inside their abode and the absence of an explanation as to the circumstances surrounding these actions, the only reasonable conclusion that could be drawn is that the murders were premeditated thus attracting a minimum sentence of life imprisonment on each count, subject to a finding that there existed "substantial and compelling circumstances", in terms of the provisions of the Criminal Law Amendment Act⁴;
2. That the seriousness of the crimes, their premeditation, the manner in which they were executed and the lack of remorse on the part of the appellant all far outweighed any benefit the appellant might have been

⁴ No. 105 of 1997

accorded with regard to his personal circumstances and that, accordingly, no substantial and compelling circumstances existed in this matter.

[24] Mr. Mgcotyelwa has argued that the trial court ought to have found that the appellant's personal circumstances, namely that he is 54 years old, a first offender, an employed family man with four minor children and that he spent approximately 2 years awaiting trial, should have cumulatively constituted substantial and compelling circumstances for the purposes of section 53 of the Act.

[25] In my view, there being no misdirection on the part of the court *a quo* in its assessment in this regard, there can be no argument whatsoever with its finding that no substantial and compelling circumstances existed. In my view, furthermore, even if the provisions of Act 105 of 1997 had not been in existence, the seriousness of this crime involving as it did the murder of defenceless children warranted the imposition of life imprisonment. As stated by the DJP presiding on this appeal during the course of argument, to allow the appellant's personal circumstances to outweigh the seriousness of the crime in this regard would amount to showing undue mercy to "a family man who murders children".

[26] In these circumstances, I am of the view that there is no basis whatsoever for interfering with the sentence imposed by the court *a quo*.

[27] Accordingly:

**1. The appeals against both the convictions and sentences
are dismissed;**

2. The convictions and sentences imposed by the court are
quo are confirmed.

R E GRIFFITHS
JUDGE OF THE HIGH COURT

NHLANGULELA, DJP : **I agree**

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

DAWOOD, J. : **I agree**

JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT : **Mr Mgcotyelwa**
INSTRUCTED BY : **Legal Aid Board**

COUNSEL FOR RESPONDENT : **Mrs Trietsch**
INSTRUCTED BY : **Director of Public Prosecutions**

HEARD ON : **29 JULY 2016**
DELIVERED ON : **16 AUGUST 2016**

