

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A28/2013

In the appeal between:

MOHAPI JOHANNES NTELEKOA & ANOTHER Appellants

And

THE STATE Respondent

CORAM: DAFFUE, J *et* LEKALE, J *et* HINXA, AJ

JUDGMENT: DAFFUE, J

HEARD ON: 2 MARCH 2015

DELIVERED ON: 5 MARCH 2015

INTRODUCTION

- [1] On 24 January 2013 appellants were convicted by Van Zyl J of murder and housebreaking with the intention to rob and robbery with aggravating circumstances. The next day both were sentenced to life imprisonment in respect of the first count and 15 (fifteen) years' imprisonment in respect of the second count. The appellants were granted leave to appeal against their convictions to the full bench.

GROUND OF APPEAL

- [2] The convictions are attacked on the following bases. 1st Appellant avers that the court *a quo* erred (a) in finding that the State has proved its case beyond reasonable doubt, (b) in finding that his pointing out complied with all formal requirements, that it was made freely and voluntarily and without being unduly influenced, and (c) in rejecting his alibi as false and not reasonably possibly true.
- [3] 2nd Appellant avers that the court *a quo* erred in (a) making a credibility and reliability finding in respect of the witness Mapule Sylvia Ntelekoa, the mother of 2nd appellant, and not considering her evidence with caution as she was a single witness, (b) finding that 2nd appellant wanted to confess when he communicated with his mother, (c) concluding that 2nd appellant's admission that he "ook daar saam met Lebohang was" with reference to Mr Ben Steyn, the deceased, (and after his confession that he and Lebohang had murdered a white person - not Mr Steyn -) was sufficient to convict 2nd appellant on both counts as charged and thus finding that the only reasonable inference to be drawn from the proven facts was that the 2nd appellant committed the crimes.

THE RELEVANT LEGAL PRINCIPLES

- [4] Where an appeal is lodged against a trial court's findings of fact, the court of appeal must take into account that the court *a quo* was in a more favourable position than itself to form a

judgment. When inferences from proven facts are in issue, the court *a quo* may also be in a more favourable position than the court of appeal, because it is better able to judge what is probable or improbable in the light of its observations of witnesses who have appeared before it. Therefore, where there have been no misdirections on fact a court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings, unless it is convinced that they are wrong. See **R v Dhlumayo and Another** 1948 (2) SA 677 (AD) at 705 - 6.

- [5] Therefore, in order to interfere with the court *a quo*'s judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory, or where the record shows them to be such. See also **S v Monyane and Others** 2008 (1) SACR 543 (SCA) at para [15] where the Supreme Court of Appeal stated that it is only in exceptional cases that that Court will be entitled to interfere with the trial court's evaluation of oral evidence, and I quote: "This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that

this court will be entitled to interfere with a trial court's evaluation of oral testimony (S v Francis 1991 (1) SACR 198 (A) at 204e).”

There may also be misdirections, though the reasons were satisfactory, if it has been shown that the court *a quo* had overlooked other facts or probabilities.

- [6] The State’s case was largely based upon circumstantial evidence, in particular in respect of 2nd appellant. In **R v De Villiers** 1944 AD 493 at 508 - 9 the Appeal Court referred to the well-known *dictum* in **R v Blom** 1939 AD 188 at 202 pertaining to the test to be applied when reliance is placed on circumstantial evidence and pointed out that it is not each proved fact that must exclude all other inferences, but the facts as a whole must do so, and continued as follows:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way: the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”

See also **S v Ntsele** 1998 (2) SACR 178 (SCA) at 182b - f cited with approval in **S v Boesak** 2000 (1) SACR 633 (SCA), para [13] at 638f and **S v Reddy and Others** 1996 (2) SACR 1 (A) at 8c – g and especially the following *dictum*:

“A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . .”

As mentioned in these three judgments the ambit of the concept of reasonable doubt does not go so far that the State must prove the guilt of the accused “bo elke sweempie van twyfel”, or put otherwise, “beyond a shadow of a doubt.”

- [7] It is also necessary to consider whether an accused who deliberately gives false evidence in the hope of, e.g. escaping conviction, should lose his case as a penalty for perjury. The often-quoted *dictum* of Malan JA in **R v Mlambo** 1957 (4) SA 727 (A) at 738 B – D must be considered and I quote: “Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, per chance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts, a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.” It has been recognised in **S v Steynberg** 1983 (3) SA 140 (AD) at pp 146 – 149 that the application of the **Mlambo** approach often has satisfactory and correct results, but the application does not mean an inference must be drawn that

an accused had the intention to kill someone where he has provided a false explanation about a fatal assault he perpetrated on someone about which he alone was able to give evidence. Every case must be decided on its own particular circumstances. The nature of the accused's lies is of great importance, but in addition, the context of the case and all other factors which appear from the evidence are relevant to the adjudication of the question whether the inference that the accused committed the crime(s) could be drawn. In considering this, the rules of logic in connection with circumstantial evidence mentioned above must be observed.

- [8] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows in **S v Chabalala** 2003 (1) SACR 134 (SCA) at para [15]:

“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.”

- [9] Although it is permissible to test the accused's version against the inherent probabilities, it cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so

improbable that it cannot reasonably possibly be true. See: **S v Shackell** 2001 (2) SACR 185 SCA, para [30] at 194h.

[10] In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. See **S v Shilakwe** 2012 (1) SACR 16 (SCA) at 20, para [11]. The Supreme Court of Appeal approved of the following *dictum* :

“But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a

whole. If that is not done, one may fail to see the wood from the trees.”

See **S v Hadebe and others** 1998 (1) SACR 422 (SCA) at 426f – h and **S v Mbuli** 2003 (1) SACR 97 (SCA) at 110, para [57].

- [11] The same principles apply when an alibi defence is relied upon by an accused. The acceptance of the evidence on behalf of the State cannot by itself be a sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating the accused is true which can only be done if there is at the same time no reasonable possibility that the evidence exculpating him is true. See **S v Van Aswegen** 2001 (2) SACR 97 (SCA) at paras [7] & [8], 100f-101e and **S v Liebenberg** 2005 (2) SACR 355 (SCA) at 358h – 359e, paras [14] and [15]. The effect hereof is that once the trial court accepts the evidence in support of an accused’s alibi as reasonably possibly true, it follows that the court should

find that there is a reasonable possibility that the evidence led on behalf of the State is mistaken or false.

[12] Bearing in mind the above the correct approach is to consider the alibi in the light of the totality of the evidence in the case and the court's impression of the witnesses. See **R v Hlongwane** 1959 (3) SA 337 (A) at 341A. In doing so, the trial court should remind itself that no onus rests on an accused and that the State must prove that the accused committed the crime and it must therefore disprove the alibi.

[13] A court should particularly be careful in assessing a confession or pointing out, which is usually nothing but a confession by conduct, where such confession is the only evidence incriminating the accused. See: **S v Mkwanzu** 1966 (1) SA 736 (A). This is a judgment pronounced decades before the promulgation of our Constitution. Furthermore, impartial persons should take confessions, and pointings out for that matter. This was emphasised decades ago in **S v Mbele** 1981 (2) SA 738 (A) at 743. The Appeal Court warned explicitly that the persistent practice of the police of not using impartial persons was in complete

disregard of repeated expressions of disapproval by the courts. See also: Kruger A, **Hiemstra's Criminal Procedure** 24 – 58. In our present constitutional dispensation courts should even be more wary to ensure that the rights of accused persons, especially the unsophisticated and the poor, are not trampled upon. They are entitled to fair trials and it is the duty of the courts to give practical effect thereto.

- [14] The right to remain silent and its effect on the disclosure of an alibi defence was thoroughly discussed and considered in **S v Thebus** 2003 (6) SA 505 (CC) at 533 and further. The CC, per Moseneke J, found that a distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent. It is clear that the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi, although standing alone, it does not justify an inference of guilt. Secondly, such late disclosure is a factor to be taken into consideration in determining the weight to be placed on the evidence of the alibi. The Court stated further:

“The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately

be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole.” At para 68, 537G.

EVALUATION OF THE COURT A QUO’S JUDGMENT

[15] Several admissions were made and recorded in terms of section 220 of the Criminal Procedure Act, 51 of 1977. The following were admitted: (a) the identity of the deceased, to wit Barend Hendrik Steyn, also known as Ben Steyn, (b) that Dr Ferreira conducted a medico-legal autopsy on the deceased on 8 November 2010, (c) the correctness of the facts and findings in the report of Dr Ferreira, (d) the cause of death, to wit blunt trauma to the head and chest, (e) that the report may be handed in as exhibit, (f) the deceased did not incur any further injuries from the scene until the autopsy was conducted, (g) the correctness of the photographs taken during the autopsy and at the scene.

[16] The pointing out by 1st appellant admitted by the court *a quo* is attacked by Ms Smit on the basis that it did not comply with formal requirements, was not made freely and voluntarily and without undue influence. It is also 1st appellant’s latest version that Capt Laux (“Laux”) of the Organised Crime Unit in Bloemfontein wrote down his own

version during the alleged pointing out and that the information contained in exhibit “G” read with exhibit “E” was not communicated by him to Laux. Several photographs taken during the pointing out are relied upon by the State. The admissibility of 1st appellant’s warning statement was also in contention during the trial. It did not form part of the record, but was handed in from the bar by agreement. Three witnesses testified on behalf of the State in the trial within a trial and 1st appellant testified in his defence. Laux assisted in the pointing out as mentioned and Sergeant Weyers of the Local Criminal Record Centre, responsible for taking photographs, accompanied him. They both testified as well as Warrant Officer Thoko (“the IO”) who took down the warning statement. It is 1st appellant’s case that he was assaulted by the IO and other policemen. Ms Smit was not prepared to argue that her client had been assaulted as alleged. Initially it was 1st appellant’s case that the IO dictated to him what he had to convey to Laux during the pointing out. He also maintained that his constitutional rights were not explained to him by either the IO, or Laux. Later on 1st appellant changed his version and testified that Laux was the author of the version contained in the pointing out notes, exhibit “G”, and that he did not convey any of the recorded information to him.

- [17] Laux is the commander of the IO and I must at this stage make certain remarks about the *modus operandi* of the members of the Organised Crime Unit in Bloemfontein relating to taking down of confessions and pointings out. I

find it disturbing that an officer of an investigating unit is utilised to take down confessions and oversee pointings out by accused persons. There is no statutory prohibition, but the practice cannot and should not be tolerated and/or recommended. In fact, the practice should be abolished. There can be no doubt that accused persons always try to create the impression in trials within trials that although the particular officer taking down the confession did not assault them, he was either fully aware of assaults and/or threats and/or have full knowledge of the investigation and the facts established by then. It is possible for a member of the same unit to obtain information from the docket, or the investigation officer, or first hand by visiting the crime scene. It is highly likely that detectives discuss their cases with each other, especially in so-called priority cases and a junior officer, in particular, will call upon his commander or other seniors for advice from time to time. Confessions should be taken down by magistrates or officers from other units. A pointing out should be done under the auspices of an officer of a different unit. There is no reason why the Station Commander of any one of the police stations in Bloemfontein could not be approached in this regard. Suspicion may go a long way to persuade a presiding officer to find that the State has not proved its case beyond reasonable doubt. In my experience, and the facts in this case show that also, accused persons' versions as to alleged assaults and/or threats are usually so exaggerated and fanciful that it is often quite easy to reject same as not reasonably possibly true and therefore false if weighed with the evidence of State witnesses who most of

the time are experienced police officers and well-groomed witnesses who are used to be subjected to cross-examination, often by inexperienced legal representatives (which was not the case *in casu*). This being so should not be a *carte blanche* to the police to carry on with the aforesaid practice.

[18] The 1st appellant's improbable version, rife with several contradictions, did not impress the court *a quo* and it was correctly found that his version was not reasonably possibly true and therefore false. His version changed as the trial proceeded and eventually Laux was blamed for writing down his own version and instructing the appellant from time to time to point his finger to various things to be photographed. Bearing in mind the detailed version contained in the notes prepared by Laux during the pointing out, nobody could believe 1st appellant that Laux made up the version and attributed that to 1st appellant. The testimony of the three policemen is far more probable than 1st appellant's version which the court *a quo* correctly rejected as false. Notwithstanding my criticism above I cannot find that the pointing out *in casu* was admitted incorrectly. I am satisfied that Laux explained 1st appellant's rights to him fully, that the pointing out was done freely and voluntarily and without undue influence. It has been conceded that no assault took place as alleged. It is not necessary to consider the admissibility of the warning statement.

- [19] It is necessary to deal with further submissions made during Ms Smit's argument. No interpreter was used during the pointing out, but Laux confirmed that he and 1st appellant communicated well in Afrikaans. The record confirms 1st appellant's knowledge of Afrikaans and he even instructed his legal representative about the contents of the alleged communication between Laux and the son of the deceased. Although accused persons should as far as possible be allowed to be consulted in their mother tongue, it remains a fact that our indigenous languages have not developed fully in order to translate technical aspects of the law into them. One often hears interpreters using Afrikaans or English when technical aspects are interpreted into one of the indigenous languages. I have in mind aspects such as "evidence" or "getuienis" or "burden of proof" to mention a few.
- [20] Ms Smit's submission that Laux should not have proceeded with the pointing out at the stage when 1st appellant indicated that he would like to apply for legal aid is without substance and rejected based on the remainder of the questionnaire, 1st appellant's willingness to proceed with the pointing out and the totality of the evidence. It is pertinently recorded that 1st appellant did not wish to contact any person at that stage. It could not be expected of Laux to refer 1st appellant to the Legal Aid Board under the prevailing circumstances. In any event, when 1st appellant testified, this aspect was not even canvassed with him at all, his main concern being that Laux presented his own version of the pointing out as that of 1st appellant. He testified in vague terms and in response to a

leading question that his rights were not fully explained to him, as if he was supposed to know what these rights entailed. He never said that he was unaware of the consequences of his pointing out. Laux was corroborated by Weyers, the photographer. 1st appellant had no fresh injuries and his version of the assault by the IO and others is denied by the IO. Nothing was recorded by Laux in this regard and photographs taken of 1st appellant's torso and back do not support the allegations of an attack as described. 1st Appellant eventually testified that he did not inform Laux that he had been assaulted.

[21] I trust that my discomfort and warning relating to the aforesaid practice of the Organised Crime Unit in Bloemfontein, and probably applicable to other units in the country as well, shall be heeded in future. The police must rather rely on proper and detailed investigations based on scientific and experienced detective work, instead of confessions or pointings out which may give rise to suspicion, rightly or wrongly, especially when no other incriminating evidence is available. I should not be understood to say that there is no place for this kind of evidence in our criminal justice system and my warnings should be seen in proper context.

[22] 2nd Appellant's mother was a single witness. The court *a quo* recognised this and was fully aware of the principles to be applied. Notwithstanding this it found that Ms Ntelekoa was an honest and reliable witness. 2nd Appellant's attempts to discredit his mother failed completely. In the process he

denied any credibility that he might have. Logic dictates that a mother would rather try to protect her child, instead of producing false evidence incriminating him dismally. The temporary change of her version halfway through cross-examination was immediately rectified and I must say that it was apparent to me whilst reading the record that she probably accepted that her son's admission was in reality a confession to the crimes committed although this was not communicated in so many words. During her cross-examination the following leading question was put to her by Mr Reynecke: "En u dink hy was betrokke by Ben Steyn se dood?, Although aware of the deceased's death when she visited her son, Ms Ntelekoa did not before then try to intimate that her son actually admitted to be involved in the death of the deceased. Her reply to the question which she repeated again was: "Ek dink nie hy het vir my gesê." When she was further cross-examined she became confused and testified that her son had informed her that he was involved in both murders. Finally, in cross-examination she reverted to her initial version, i.e. that her son admitted to be involved, but that he never said that he was involved in the killing of the deceased or that he assisted in the killing. When 2nd appellant communicated with his mother, he did so freely and voluntarily and without being unduly influenced. He was in tears and apparently opened his heart to his mother.

- [23] This brings me to the conclusion arrived at by the court *a quo* in respect of 2nd appellant's involvement in the crimes. I refer to the authorities quoted. Circumstantial evidence and the

application thereof in order to adjudicate a criminal case is in essence based on logic. The State does not have to prove the guilt of the accused beyond a shadow of a doubt. There is no reason to find that 2nd appellant's comment, in the context of the objective and/or proven facts, should have been regarded as anything else, but that he and his co-perpetrator(s) committed the crimes. There was no reason to find that he was, e.g. an innocent bystander, or committed housebreaking only but did not rob and murder, or that he was merely an accessory after the fact to mention three possibilities. It was for him to tell the story if he was not guilty as charged, which he failed to do. Mr Reynecke submitted that Ms Ntelekoa's evidence should have been rejected as unreliable and if so, the inference drawn by the court *a quo* could obviously not have been drawn. He conceded in argument before us that if we find that Ms Ntelekoa's version was correctly accepted as credible and reliable, the court *a quo*'s finding shall not be disturbed. He conceded therefore, correctly in my view, that the only reasonable inference to be drawn from the proven facts is that 2nd appellant was one of the perpetrators who broke into the deceased's house with the intention to rob and robbed and murdered him. The facts *in casu* differ from those in **Steynberg** where the Appeal Court found that the appellant ought to have been convicted of culpable homicide and not murdered. Here, the context of the matter and the objective facts point to one reasonable inference to be drawn only, in the absence of an acceptable explanation by 2nd appellant

and taking into consideration his untruthfulness, and that is that he committed the crimes, albeit not on his own.

[24] Having considered the reasoning of the court *a quo* and the evidence presented to it, I am satisfied that the court *a quo* committed no misdirections. I have reconsidered and re-evaluated the evidence and bearing in mind that courts of appeal are slow to disturb findings of credibility, I am satisfied that even if it could be said that this court had the benefit of an overall conspectus of the full record and is in a better position to draw inferences, the court *a quo* cannot be faulted. Having perused the full record and the reasons of the court *a quo* the *dictum* of the Supreme Court of Appeal **S v Monyane and Others** *loc cit*, quoted above, is apposite.

[25] The appellants had a constitutional right to remain silent, but as mentioned in **Thebus** *supra*, a trial court is entitled to consider the alibi evidence also in respect of the time disclosed. The court *a quo* did not make any issue about the fact that the alibi's were disclosed at the start of the trial only. I would have expected 1st appellant in particular to immediately establish the reason for the police's action on Saturday, the 6th November, the day after the murder, and to inform them there and then that he and his family members who were all in attendance at that stage had been building a shack over the past two days and that he could not have been on the deceased's plot. The family members would be able to vouch for the truth if this was indeed so. If he was

not given an opportunity to say anything, or not even informed of the reason for removing him from his relatives, the relatives would surely investigate and communicate with the police or investigating officer in order to persuade them of their relative's innocence. In any event, if this is too high an expectation, he should have given full details of his alibi when his warning statement was taken down or at the latest during his plea explanation. His version according to his plea explanation – that he went with his brother to buy corrugated iron which they took to the township – is not only vague in the extreme, but was contradicted in his evidence. They did not buy the material according to his evidence. He never mentioned in his plea explanation, the actual reason for his alleged absence from the deceased's plot, to wit the building of the shack over a period of two consecutive days together with identified family members and at an identified address far away from the crime scene. His alibi witness confirmed his version in numerous aspects, but in the light of the totality of the evidence the court *a quo* cannot be faulted for dismissing it as false. In my view there was ample opportunity to concoct a version, although this was denied by the defence witness.

- [26] 2nd Appellant is in a not too different situation although he was not apprehended soon after the commission of the crimes. His mother visited him twice whilst he was in custody in respect of a different offence. When informed that the police were searching for him following the murder of the deceased and another person, it would be easy to request

his mother to speak to his wife and the neighbours in order to establish whether they supported his version and for her to communicate with the investigating officer at that early stage already. That would be the case if he insisted to be innocent, but as the record reflects, he admitted to his mother his involvement at the deceased's plot. His estranged wife refused to testify on his behalf. Fact of the matter is that although there was no onus on 2nd appellant to prove his alibi, he failed to lay a sufficient factual basis for the court *a quo* to have accepted his version as reasonably possibly true in the light of the totality of the evidence.

[27] In conclusion, I am satisfied that the State has proved the guilt of appellants beyond reasonable doubt and that the court *a quo* arrived at the correct verdict.

[28] Consequently the following order is issued;
The appeals of both appellants are dismissed and their convictions are confirmed.

J.P. DAFFUE, J

I concur.

L.J. LEKALE, J

I concur.

M.D HINXA, AJ

On behalf of appellants: Ms L Smit and Mr D Reynecke
Instructed by:
Bloemfontein Justice Centre
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On behalf of respondent: Adv C van der Merwe
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