

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

Case no. 55/02

In the matter between:

THABISO MOTSETSE

First Appellant

XOLANI CHARLES NGCOBO

Second Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

Stretch J:

1. The appellants were accused nos 1 and 2 in the court *a quo*. They were initially charged together with accused nos 3 and 4, but the charges were withdrawn against the third accused (“Malashe”) and he became a state witness who was warned in terms of section 204 of the Criminal Procedure Act 51 of 1977 (“the Act”).
2. The two appellants, together with the fourth accused, were indicted and convicted on charges of murder, robbery with aggravating circumstances, and possession of arms and ammunition. On 3 September 2002 they were sentenced by the court *a quo* to life imprisonment for the murder, 15 years for the robbery and four years for the possession of the arms and ammunition, the cumulative effect being life together with 19 years’ imprisonment.

Delay of the appeal

3. There has been an inordinate lapse of time between the sentencing of the appellants and the finalisation of this appeal.
4. It appears from their application for condonation (which was unopposed) that the appellants unsuccessfully applied for legal aid to prosecute applications for leave to appeal. Thereafter funds were raised for them to brief an attorney. The attorney was faced with a number of systemic delays in obtaining a transcript of the trial record, culminating in the first appellant addressing a representation to the Judge President of this Division, the Judicial Services Commission and the Minister of Justice and Constitutional Development, on 25 August 2009, complaining that he had been trying to have the judgment signed for seven years. As a result of the intervention of the Judge President, leave to appeal against the convictions and the sentences imposed was granted on 27 July 2012. Thereafter further delay was occasioned by the fact that portions of the recorded evidence were missing in the transcript, and had to be reconstructed. The record of an alleged confession made by the second appellant, is still missing and cannot be traced.

The grounds of appeal

5. The appellants' grounds of appeal on conviction are the following:
 - (a) The evidence of the "accomplice witnesses" was inadequate.
 - (b) The chain evidence with respect to the arm used in the murder is incomplete.

- (c) The second appellant's pointing out and confession should have been ruled inadmissible.
 - (d) The evidence of the appellants, of accused no. 4 and that of the alibi witnesses ought to have been found to be reasonably, possibly true.
 - (e) The amendment by the trial judge of the indictment by introducing a further firearm after the close of the state's case was prejudicial to the appellants.
 - (f) Counsel who initially represented accused no. 3 (who became a state witness) ought to have discontinued representing the appellants and accused no. 4 as he was thereafter presented with a conflict of interest.
6. As for sentence, it has been contended that the appellants were not advised of the provisions of section 51 of the Act, and that their cases presented substantial and compelling circumstances for deviating from the prescribed discretionary minimum sentence provisions, which circumstances the trial judge overlooked.

The respondent's position

7. Counsel for the respondent has sought not to defend the judgment of the trial court. In this regard it is contended that:
- (a) The trial judge frequently descended into the arena in particular to defend serious weaknesses in the case of the accomplice witness, without which information there would have been no direct evidence for the state.
 - (b) The prosecution witnesses David Bam, Bandile Mbanga and Siphiwo Gcelu were on their own versions accomplices. As such their

evidence ought to have been analysed with caution. The trial court labelled them as independent witnesses. This was a misdirection.

(c) The evidence regarding the so-called pointing out and confession made by the second appellant is so fraught with difficulties, that counsel for the state was not in a position to press for the admission thereof. It is contended that the same applied to the so-called independent witnesses who testified to fortify the chain evidence (such as it was) available to the state.

8. In a nutshell, the respondent submitted that it would abide the decision of this court. Differently put, it was clear during argument before us that the respondent was conceding that the convictions could not stand.
9. Whilst I do not necessarily agree with all of the respondent's reasons for making this concession (for example that the prosecution witnesses Mbanga and Gcelu were accomplices on their own versions), I am of the view that the concession is properly made.
10. It is evident that there lies some merit in all of the grounds of appeal which I have already mentioned and I do not intend traversing each of these in detail. It is however necessary, to mention just a few issues which I deem to be have been fatal to the case for the prosecution, and which seemed to have been overlooked by the trial court to the extent that such oversight had the effect of vitiating the convictions altogether.

Outline of the evidence

11. At about 6pm on 8 November 2001 attorney Ellis Nodada ("the deceased") was murdered and robbed of his Audi A4 at gunpoint in the driveway of

his home in Southernwood, Mthatha. The car was found abandoned the next day.

12. The appellants and two others were arrested. As I have mentioned, the erstwhile third accused (“Malashe”) turned state witness. The remaining accused pleaded not guilty, raising alibis in their defence. Unless otherwise stated, they will collectively be referred to as the accused.
13. Malashe described how he and the accused were on their way to town on 8 November when they spotted the deceased in his car. It was suggested that the car should be hijacked and he was handed a firearm to defend himself. The accused were all already armed. When the deceased turned into his driveway, he and the appellants ran towards the residences. The first appellant was leading. As he got closer, he heard a bang and a male person screaming. He became frightened and fled.
14. While still in the area, he came across Mbanga who gave him a lift to a petrol station in town where he had arranged to meet Bam. They proceeded back to Southernwood to the home of Bam’s cousins. Shortly thereafter the fourth accused phoned and said that they should meet. He and Bam met up with the accused in a street in Southernwood. They were in a white Polo motor-vehicle. They reported that they had overpowered the deceased, but that they had abandoned the car as it was damaged. They told him to return the firearm which he had been given.
15. He saw accused no. 4 the next day and the two appellants about two weeks later in Mthatha. He was arrested and released on 7 May 2002. He made a statement to the police on 5 May 2002 as he was anxious to come clean and get the whole incident out of his system.

16. Malashe's friend Mbanga confirmed that he came across Malashe running towards him on 8 November. He asked what the matter was, to which Malashe replied "ijampile" which roughly translated means that whatever he had been trying to do had been unsuccessful. He gave Malashe a lift. Malashe phoned Bam who came to fetch him.
17. Bam, who confirmed that Malashe had phoned him, testified that earlier on that same day the accused and Malashe had been at the fourth accused's house where a mechanic by the name of Siphiwo Gcelu also lived. He also confirmed that he and Malashe met up with the accused after the fourth accused had phoned Malashe, but said that he left Malashe behind with the accused, and only met up with him later, upon which Malashe told him "the full story". He saw the appellants on two separate occasions thereafter.
18. During December 2001, he says, the fourth accused asked Bam to transport certain items from his house to Bam's house. Included in these there was a firearm. During April/May 2002 the police asked Bam about the firearm, but he denied all knowledge thereof. During June this questioning was repeated, as a result of which Bam referred the police to Malashe. During July, Bam explained to the police that when he had transported the fourth accused's items there was a firearm in one of the boxes. When he was arrested later on that month, he arranged for one Mbulelo and one Mfolo to remove this weapon from his house.
19. A firearm was handed in as an exhibit in the court *a quo*. Evidence was also led as to how a certain firearm made its way from the fourth accused's home via Bam to the police who arranged for that firearm to be dispatched

for forensic analysis together with two spent cartridges retrieved from the scene of the murder. It was ultimately established that one of these projectiles was fired from this firearm.

20. Gcelu, the mechanic, said that late in the afternoon of 8 November, the accused and Malashe left his house in a white Polo. He also had drinks with the appellants and the fourth accused at his home (Gcelu's home) the next night.
21. He was arrested with the appellants on 5 December 2001.
22. A trial within a trial was held with respect to a pointing out made by the second appellant during which he pointed out the scene of the crime and the place where the robbed vehicle had been abandoned. The appellant alleged that he had been assaulted in order to induce him to point out these places. The trial judge found him to be a "pathetic liar" and the evidence was ruled admissible.
23. The prosecution also sought to introduce evidence of an alleged confession made by the second appellant to a commissioned police officer. As I have said, this alleged confession remains missing and is not before us. The content of the "confession" was not read into the record and it is not possible to determine what the content thereof was. In the circumstances counsel were agreed, correctly, that the appeal must be decided as if no such statement was ever made. No further reference need be made to this document.
24. Both appellants testified in the main trial. The first appellant admitted that he knew the second appellant. He testified that from 8 to 11 November he

was in Pietermaritzburg attending his grandmother's birthday celebrations. This evidence was confirmed by his uncle with whom he had allegedly stayed in Pietermaritzburg during that period.

25. The second appellant also admitted that he knew the first appellant, the fourth accused, Malashe, Bam and Gcelu. He testified that during November 2001 he lived in Gauteng. At that time he was in the process of moving house. On 4 November he moved to Northern Park, Johannesburg to stay with a friend and had no knowledge of the events surrounding the murder and the robbery of the deceased in Mthatha on 8 November.
26. Accused no. 4 likewise admitted that the appellants are friends with each other and that they are also his friends. He confirmed that he knew Malashe and Bam and that Gcelu was staying with him at the time of the commission of the offences. He testified that he was in Mthatha on 8 November. At about 4pm his girlfriend phoned him from Coffee Bay with the news that she was about to give birth. He proceeded to Coffee Bay and returned to Mthatha the next day. His version was supported in material respects by his girlfriend.

The findings

27. The trial court found that Malashe was initially not an impressive witness and that it was obvious that he was distancing himself as far as possible from any involvement in these offences. According to the trial judge, it was only after the court had warned him once again of the impact of its warning to him in terms of section 204 of the Act, that he became more relaxed and the court gained the impression that he then realised, "most probably for the first time", that to divulge incriminating evidence was not

tantamount to a conviction. The trial court also reminded itself that these events had occurred about eight months before and “under very traumatic and trying circumstances for accused no. 3”(Malashe). In this regard the trial judge said the following:

‘His evidence is far from flawless, there are contradictions between his evidence and David’s, but they to my mind relate to matters which are either immaterial or can be described as irrelevant detail ... There are also contradictions between his evidence and the statement he made to Captain Gwayi on 5 February, Exhibit F. Many of these discrepancies are to a very large extent explained by the open and frank evidence of Captain Gwayi, who conceded that he could most probably have been the culprit for certain misunderstandings which occurred between himself and No 3. What is however evident from this statement is that he was very keen to come clean and to take somebody into his confidence to get this burden off his chest ... Whatever valid criticism there may be against his evidence, on the one hand, is in my view successfully countered by the fact that the totality of his evidence (the essential features), the broad view of what had happened that afternoon is successfully corroborated by independent witnesses, David, Bandile and Siphiwo. It also fits in with the realities of this case, and that is that the deceased was shot, his Audi motor vehicle robbed and abandoned at Unitra. To this must be added No 2’s pointing out of the scene of the crime, etcetera, and his confession, Exhibit O ... All in all, and having regard to the application of the cautionary rule referred to above, I am of the view that despite the defence, the totality of his evidence can be accepted as truthful and reliable.’

28. The trial judge likewise found that Mbanga was a good witness and said that he had no hesitation in accepting his evidence as reliable and truthful.
29. The judge’s view regarding Bam’s testimony was that it ought to be approached with an open mind. He described Bam as self-confident and arrogant, but credited the witness with the detailed manner in which he had testified. The trial court said the following of Bam’s evidence:

‘That his evidence suffers from defects, contradictions, etcetera is plain and in particular the contradictions between himself and No 3. But again, as previously pointed out, these discrepancies are in respect of irrelevant or minor detail and do not touch the heart of the matter, the overall picture.’

30. With respect to Bam having conceded that he had purposefully misled the police with regard to the firearm, the court was of the view that this seemed to indicate that he was no newcomer or amateur in the league in which he was competing.
31. The trial judge described Gcelu as a good witness whose evidence to a large extent confirmed the presence of the accused in Mthatha on 8 and 9 November as alluded to by Bam and Malashe.
32. The court *a quo* found that the first appellant and his uncle did not make a bad impression as witnesses, but once again described the second appellant as a pathetic liar, and the fourth accused and his alibi witness as bad, dishonest witnesses, whose versions deserved to be rejected as false.
33. In dealing in particular with the alibis, the judge concluded that he was not in a position to separate the two appellants from Malashe, saying that “it is a matter of they all swim together, or they all drown together” (a statement which I shall revert to later).
34. In finding that at the end of the day the case had to be approached on the State’s evidence, the judge concluded that it had been *prima facie* established that the accused and Malashe had armed themselves and had left for Mthatha that day with no definitive goal or motive in mind. However, when they came across the deceased’s car, it was immediately resolved that it had to be hijacked there and then, and that they had acted

accordingly. The trial judge then describes what must have transpired thereafter, as follows:

‘Their vehicle was parked in a nearby street with No 1 in control, whilst the other three, armed, ran towards the driveway where the Audi had entered. No 1 in front, with No 2 and 3 following. No 4 waited at the vehicle, also armed. After “the banging of the door and the screaming of a male person” No 3 bailed out, turned around and ran away. The deceased’s body was found in his driveway and the Audi vehicle was later recovered from where it was abandoned on the campus of Unitra. The deceased’s cause of death was recorded as “gunshot, abdomen, inferior vena cava and aorta”’.

35. According to the trial judge, this prima facie evidence had now become conclusive in view of his rejection of the versions of the accused.
36. Dealing with the legal aspects of co-perpetrators and common purpose, the court found that all the accused knew that they were going on a housebreaking expedition in a car and that one of them was armed with a revolver which had been obtained and loaded for the occasion, and that they must have foreseen, and by inference did foresee the possibility that the use of a loaded firearm would have fatal consequences, and that they were reckless as to whether the fact of death would ensue or not.
37. I digress to mention that the trial court’s view in this instance seems at odds with the court’s earlier deduction that the accused and Malashe had all armed themselves and had left for Mthatha with “no definitive goal or motive in mind.”
38. It appears further, that immediately before judgment the trial Court allowed for an amendment to count three to refer to “firearms” as opposed to “two firearms” because it turned out that the evidence led by the

prosecution referred to three firearms. He thereafter found that the chain evidence with respect to the firearm produced at the hearing had been satisfactorily completed, “at least prima facie”, and that because Malashe’s evidence was that each of the three accused possessed his own firearm when Malashe left the scene, they could each be convicted of possession of a firearm even if it had not been recovered.

39. Thereafter the judge, after having granted Malashe indemnity from prosecution, convicted the appellants and accused no. 4 as charged on the murder and robbery counts, as well as for each possessing his own firearm and ammunition.

The material irregularities

40. In my view the learned judge, after having warned himself carefully regarding the level of scrutiny to be applied to the evidence of an accomplice witness, failed to properly apply this test to the evidence of Malashe. Malashe was a poor witness who cannot be said to have withstood the general test applied with respect to accomplices. I say so for the following reasons:

- (a) It is improbable that he would have embarked on an innocent journey with the other accomplices, that they would have decided to rob the deceased on the spur of the moment, and that they would have brought a firearm along by sheer coincidence for him to “defend himself” (against what I do not know). Malashe vacillated between the version of an innocent victim and that of a robber.
- (b) This is borne out by the difference between his affidavit, where he admits to having witnessed the first appellant struggling with the

deceased at the car, and his evidence at the trial that he did not see any of this.

- (c) Malashe's evidence does not accord with the probabilities, being that he was part of a planned robbery, to the extent that Mbanga had been mandated to provide the get-away motor-vehicle, which he did. That is why it was not necessary for Malashe to explain to Mbanga what he had been doing and where he had been. It is probable that Mbanga knew. By the same token it was not necessary to explain his position to Bam. In the light of what I have said, this was not a case where Malashe, Bam, Gcelu and Mbanga "sat down and fabricated an intriguing tale", which would be a ridiculous notion and which was quite correctly rejected by the trial court as a probability. On the contrary, the probabilities militate in favour of a finding that Malashe, Bam and Mbanga were not independent witnesses and in my view the trial judge ought to have had serious concerns about their independence (a concession which was also made by the respondent on appeal).
- (d) In this regard Malashe's evidence was materially contradicted by both Mbanga and Bam, despite the trial judge having found that Bam, Mbanga and Gcelu had successfully corroborated his evidence as "independent" witnesses.

41. In my view Bam, Gcelu and Mbanga were anything but independent. What follows are but a few examples of why I say so:

- (a) If Gcelu was indeed an independent witness, one would have expected him to have asked Malashe what was going on. Gcelu in any event had a motive to implicate the accused as he believed that they were involved in the murder of his friend.

- (b) I agree with the appellants' counsel that the prospect exists that the real perpetrators had the deceptive facility at their disposal to persuasively describe a robbery which they had been party to, with their only deviation from the facts of that robbery being the substitution of some of the real culprits with the appellants, particularly when such evidence could earn Malashe indemnity from prosecution (see *S v Hlapezula and Others* 1965 (4) SA 439 (A) at 440). This is particularly so with regard to the fact that a firearm which had been in Bam's possession not only happened to be forensically linked to this case, but Bam appeared to have had at least five versions regarding his own link with this firearm.
- (c) This may not have been all that relevant, were it not for the fact that the trial judge not only believed Bam's fifth version that the arm had been given to him by accused no. 4, but then relied on this information to link the appellants to the crime. The only link between the firearm and accused no. 4 (and not the appellants) is the *ipse dixit* of Bam, who is not beyond scrutiny. I agree with the appellants' counsel that it is rather unusual that Bam mentioned Malashe in connection with the firearm before he ever made reference to accused no. 4 who was in any event arrested much later. The possibility that Malashe and Bam could have been the main perpetrators cannot be excluded, particularly in the light of Bam's explanation of how he ultimately came to be in possession of the firearm ie. that accused no.4 gave him a box of unknown items to keep, that Bam found the firearm in the box, that he asked others to hide it when he was arrested, and that significantly, he did not mention a word of all of this to accused. no. 4 who had given him the box in the first place.
- (d) Bam testified that Malashe told him that he (Malashe) was present when the murder and the robbery were committed. Malashe denied

this. This is not only a serious contradiction between their evidence but also flies in the face of the trial court's finding that they corroborated each other. And even if they did, such corroboration would have served no purpose to strengthen the state's case against the appellants. It simply had nothing to do with them.

- (e) Mbanga is also not an independent witness. Nor is Gcelu. Their evidence in any event does not support a finding that the only reasonable inference is that the appellants committed the crimes.
- (f) It is contended by the appellant's counsel that there is no reason, on all the evidence, why Malashe, Bam and Mbanga could not have committed the crime and have substituted the appellants and accused no. 4 as the perpetrators. That may well be. However it is not necessary for this court to arrive at such a conclusion in order to find that the appellants' versions are reasonably, possibly true.

The pointing out and the alleged confession

- 42. As for the evidence of the pointing out made by the second appellant is concerned, it suffices to say that these ought not to have been admitted. It is clear from the evidence that the appellant was not given sufficient opportunity to secure the services of an attorney when he had clearly indicated that he wanted one before embarking on any procedures which may have been construed as having been self-incriminating. In my view this disregard of the second appellant's constitutional rights was sufficient for the trial court to have ruled the pointing out to the officer inadmissible.

The firearms

43. It is so that the prosecution successfully proved that the firearm referred to in the ballistic reports (given by Mziweni to Mfono who after his arrest requested his mother to take it to Luswazi who was not called to testify) was the one which fired one of the cartridge cases found on the scene. It was however never proved that this firearm was indeed the same one which Bam had received from accused no. 4. A weapon was handed in as an exhibit in court. It was not shown to either Bam or Mziweni (during their evidence) to confirm that it was the same one which they had been referring to. Indeed, it was not even shown to Mfono's mother. All she mentioned was that she was shown a black firearm.
44. Accordingly accused no. 4 was not proven to have been in possession of this firearm.
45. The trial court *mero motu* amended the charge sheet to reflect a blanket referral to "firearms" as opposed to "two firearms" without considering whether the making of the amendment would not be prejudicial to the accused. The fact that this occurred in my view constitutes a further misdirection. With regard to the organising principle for deciding the question of prejudice, Herbstein J stated as follows in *S v Gelderbloem* 1962 (3) SA 631 (CPD) at 633A referred to with approval by Murphy J in *S v Maqubela* 2014 (1) SACR 378 WCC at 388c-389d:
 'It seems to me that no matter whether the court acts on its own motion or on the application of the prosecutor it should not make any amendment without (a) informing the accused of its intention to do so, and (b) affording him an opportunity of showing that the amendment would prejudice him in his defence.'

46. The amendment was not only prejudicial to the appellants but was not supported by the evidence. The trial court found as a fact that “all the accused knew that they were going on a housebreaking expedition in a car and that one of them was armed with a revolver which had been obtained and loaded for the occasion.” Thereafter, the trial judge relied on Malashe’s evidence which he summarised as follows:

‘No 3’s evidence was clearly that all three accused were fully armed when he departed from the scene. In other words, they were in physical possession, each of his own firearm. That in my view, constitutes possession in matters of this nature. To secure a conviction of possession in these circumstances, does not to my mind not(sic) require the State to establish that the firearm in question must in fact have been recovered. The accused can consequently been convicted on count 3 on the basis that each one was in possession of one firearm, in other words, his own firearm, individually.’

47. In any event and despite the amendment, the evidence did not establish that the items alleged to have been in the appellants’ possession were capable of firing in order to bring them within the ambit of the statutory definition of firearms.

The appellants and their alibis

48. The trial court stated that the first appellant did not make a bad impression on him. The alibi witness, (the first appellant’ uncle) also initially appeared rather confident according to the court, but his memory failed him regarding other visits which the second appellant had paid to the first. In summing up the court could not find on their evidence alone, that they were bad witnesses, when it said:

‘In all fairness to these gentlemen, this Court cannot on their evidence alone, and as it stands in isolation, find that they were bad witnesses.’

49. Of the second appellant, the trial judge said that his evidence was true to form, as he proved himself on “three occasions to be a pathetic liar”. The court found accused no. 4 to be a bad witness and that his girlfriend was dishonest.
50. In dealing with these alibis, the trial court asked itself the question whether a reasonable possibility existed that they might be true. In answering this question the court made the following comment with respect to the appellants and the alibis:

‘In other words they were at all relevant times, grouped together and it would, in my view, be very difficult, if not impossible, to separate them at this late hour. And in the event of such separation if they be considered, the next question is who must be separated from whom and in respect of what incident and/or event. In my view, it is a matter of they all swim together, or they all drown together.’
51. Thereafter the trial judge concluded that because of this, the case had to be approached and considered on the State’s evidence, and because he had rejected the accused’s version, the *prima facie* State evidence had now become conclusive.
52. In arriving at this conclusion, the trial court in my view exercised its discretion upon a wrong principle. The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might be reasonably true, he must be acquitted (see *R v Hlongwani* 1959 (3) SA 337 (A) at 340h). It is significant in the matter before us that the trial judge (notwithstanding his rejection of their evidence) was constrained to describe the alibi witnesses as “not bad witnesses”.

Conclusion

53. It is accordingly clear from the foregoing that this matter is fraught with insurmountable difficulties particularly with respect to the inadmissibility of the pointing out, the inadmissibility and unavailability of the confession, the absence of forensic corroboration and the mendacity of the prosecution witnesses. Over and above that, in my view it cannot be said that the appellants' versions were not reasonably, possibly true. In *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15, Heher JA accurately summed the test up as follows:

‘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 the 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.’

54. Having applied that test to the facts and circumstances of this case, the appellants, in my view, are entitled to the benefit of the doubt. In the light of this I make the following order:

ORDER:

- (a) The orders made by the trial court with respect to the appellants (accused nos 1 and 2) are set aside.
- (b) They are substituted with the following orders:
 - (i) Accused number one is found not guilty on all counts and he is discharged.
 - (ii) Accused number two is found not guilty on all counts and he is discharged.

I.T. STRETCH
Judge of the High Court

19 March 2015

I agree:

J.W. EKSTEEN
Judge of the High Court

I agree:

G. GOOSEN
Judge of the High Court

Counsel for the appellants:

Mr J.E. Howse

Instructed by:

Kunene & Associates

Pinetown

Locally represented by:

Mpeto & Associates

Mthatha

Counsel for the respondent:

Mr M.K. Joubert

Instructed by:

The Director of Public Prosecutions

Mthatha