

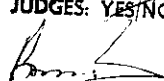


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IN THE NORTH GAUTENG HIGH COURT
REPUBLIC OF SOUTH AFRICA

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(1) REPORTED BY: ☒ YES ☐ NO
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3) REVISED: ☒

DATE 27.6.2012 SIGNATURE 

/Mm

Case number: A240/11

28/6/2012

In the matter between:

ABRAM JAMLUT LUSENGA

1ST APPELLANT

TSHILIDZI RIKHOTSO

2ND APPELLANT

CLEMENT MANGOKGOTHO MALATJI

3RD APPELLANT

WILLIAM LUCKY MASWANGANYI

4TH APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

RAULINGA J,

INTRODUCTION

[1] The Appellants were initially indicted with other accused on the following charges:

- (i) Count 1: Robbery with aggravating circumstances.
- (ii) Count 2: Kidnapping.
- (iii) Count 3: Attempted murder.

These offences were allegedly committed on the 9th August 2003 at Soshanguve.

- (iv.) Count 4 : Attempted Robbery with aggravating circumstances.
- (v.) Count 5 : Murder.
- (vi.) Count 6 : Attempted Murder.
- (vii.) Count 7 : Unlawful Possession of Firearms.
- (viii.) Count 8: Unlawful Possession of Ammunition.
- (ix.) Count 9 : Obstructing the ends of justice
(Only in respect of 1st Appellant)

These offences were allegedly committed on the 21st August 2003 at Modimolle.

- [2] The Appellants were arraigned for trial at Modimolle. The charges against two other accused were subsequently withdrawn.
- [3] On the 15th February 2007, the Appellants were convicted on the following charges:

1st Appellant:

- 1. Count 4: Attempted Robbery with aggravating circumstances.
- 2. Count 5: Murder.
- 3. Count 6: Attempted Murder.

2nd Appellant:

- 1. Count 1: Robbery with aggravating circumstances.
- 2. Count 2: Kidnapping.
- 3. Count 3: Attempted Murder.
- 4. Count 4: Attempted robbery with aggravating circumstances
- 5. Count 5: Murder

6. Count 6: Attempted Murder.

3rd Appellant:

1. Count 4: Attempted Robbery with aggravating circumstances.
2. Count 5: Murder.
3. Count 6: Attempted Murder.

4th Appellant:

1. Count 1: Robbery with aggravating circumstances
2. Count 2: Kidnapping.
3. Count 3: Attempted Murder.
4. Count 4: Attempted Robbery with aggravating circumstances.
5. Count 5: Murder.
6. Count 6: Attempted Murder.

All the Appellants were legally represented during their trial. The court *a quo* granted them leave to appeal in respect of conviction only.

- [4] It does not appear from the indictment and the record of proceedings that the Appellants were informed of the implications of the relevant sections of **Act 105 of 1997** regarding minimum sentences. However this does not turn on this case since the appeal was granted on conviction only. It appears from the summary of substantial facts that the state alleges common purpose. Another glaring omission is that the indictment does not reflect Counts 1-3 i.e. the offences alleged to have been committed at Soshanguve. The charges as reflected in the indictment don't mirror the sequence followed during the trial and what was recorded by the *court a quo* on conviction and sentence. To say the least it is very confusing.

- [5] When the trial commenced all the Appellants pleaded not guilty. They elected to remain silent. A number of exhibits were admitted as evidence by consent between the parties. The contents of the said exhibits were also admitted as being correct. Amongst these exhibits is a confession made by the 2nd Appellant which is marked "F" with annexure "F1". This confession was challenged by counsel on behalf of the 2nd Appellant.
- [6] The evidence of the State is that on the evening of 9th August 2003 Xolani Kenneth Shongwe while in the company of one Thabo was kidnapped and robbed of a motor vehicle with registration number HXZ124GP – a single cab Nissan bakkie. After he was pushed out of the vehicle while he was laying on the ground he was shot at once. However he was not struck by any bullet. Kenneth implicated the 4th Appellant as the person who pushed him out of the vehicle. It would transpire later that the 4th Appellant never appeared at an identification parade. It also transpired that Thabo could not point out the 2nd Appellant at the identification parade since he pointed somebody else. The motor vehicle in question would on the 21 August 2003 be placed on the scene of the crime with the 1st Appellant as the driver and the 2nd Appellant as a passenger.
- [7] A number of witnesses testified for the State regarding the incident of the 21st August 2003 at Modimolle. Phillip Otto and William Thulare were in the police vehicle together when they received a report that there was a suspicious vehicle in the vicinity. They followed the said vehicle for about 2 kilometres until it came to a stop. The driver i.e. the 1st Appellant alighted and gave them the name Abel Maphanga whereas his real name is Abram Lusenga. The 2nd Appellant who was a passenger in the said vehicle was found in possession of more than 20 9mm rounds of ammunition. The motor vehicle was circulated and

found to have been stolen. The 1st and 2nd Appellants were then arrested. They were taken to AE Supermarket where an attempted robbery had just been committed. However they denied any involvement in the said robbery. They were then taken to the Police Station where they were kept in custody.

- [8] On the 25th August 2003 after an interview with Captain Schutte the 2nd Appellant made a confession to Magistrate Rametse. This confession was contested by the 2nd Appellant, but found admissible by the *court a quo*, after a trial within a trial was conducted. There is also evidence that the 2nd Appellant was once employed at AE Supermarket as security officer. This is admitted by the 2nd Appellant.
- [9] Evidence was led that one of the state witnesses, Mr. De Beer, was shot at by two unknown assailants when they ran through his premises. The said assailants could not be identified nor were they found. Mr. Pretorius discovered a 9mm pistol at the graveyard not very far from A E Supermarket. The said firearm could not be linked to any of the Appellants. Mr. Quintin Otto testified that he was working for the deceased, Jose de Sousa, at the AE Supermarket. On the 21st August in 2003, there arrived robbers at the shop. They ordered him to lie on the floor, which he did. Something fell and the would be robbers ran out of the shop. Mr. David Martinho is the general manager of the shop. On the evening of the incident he was with the deceased in his office. A black man entered the office and pointed a gun at them. He heard a noise and realised that a safe had fallen. At the time they had already put the money into the safe. He assumed that the deceased had pushed the safe. He pressed the panic button to alert the security. He knows the 2nd Appellant very well since he used to work at the Supermarket.

Inspector Steyn testified on how the fingerprints were lifted and how the Appellants are linked to the said fingerprints. In particular the said fingerprints link 1st, 3rd and 4th Appellants.

- [10] The 1st Appellant testified that he was indeed the driver of the Nissan bakkie on the 21st August 2003. He was driving to Morea. He picked up the 2nd Appellant on the way and they drove into Modimolle. He denies any involvement in the crimes. He denies that he told the police that he dropped two persons next to AE Supermarket. He was seeing the 2nd Appellant for the first time. He gave the police a wrong name in order to protect himself. The motor vehicle was loaned to him by one Lloyd. The 2nd Appellant testified that he holds a licence for a firearm and rounds of ammunition which were found in his possession. He got a lift from the 2nd Appellant at Carousel at about 18h00. He was going to collect R300 from somebody at Nylstroom. He knows that the AE Supermarket makes a lot of money on a daily basis. He admits that ammunition and a cell phone were found in his possession on the 21st August 2003. He used to work at AE Supermarket.

The 3rd and 4th Appellants deny any involvement in the crimes. They plead an alibi. They say the reason why their fingerprints were lifted from the bakkie is because 1st Appellant sells products which are used to polish dashboards and that the 4th Appellant worked at a car-wash. Although they cannot give exact times and dates it is possible that at one time or another they could have had contact with the vehicle.

- [11] The high water mark of this case is centred around a confession made by the 2nd Appellant to the magistrate on the 25th August 2003. The statutory requirements governing the admissibility of confessions are governed by **Section 217 of the CPA 51 of 1977**. This section must be read with Section 219 of the Act which provides that no confession made by any person shall be admissible as evidence against another

person. While the 2nd Appellant admits that all the other requirements were met, he disputes that it was made "freely and voluntarily" and as a consequence he was unduly influenced. He alleges that he was assaulted by Captain Schutte who told him what to say and what he told the magistrate is what Schutte told him. On the confession proforma form marked exhibit F1 –para 6 on page 353 of the record, the following is recorded by the magistrate: "Die polisie het gesê ek moet vir die Landros kom vertel hoe het ons gewerk om roof te trek". Further at paragraph 7(a) and (b) the following is recorded:

- "(a.) *Het u enige beserings of kneusing van welke aard ookal en miskien dit vertonbaar is, wys dit aan my?*
Answer: "Ja, op my kop. Pyne op my skouers en pols."
- (b.) *Vertel aan my hoe u aan die beserings gekom het?*
Answer: "Tydens die arrestasie was ek deur die polisie aangerand. Dit is die enigste besering."
(There was a fresh wound of about 3-4 cm long on the back of his head)

This is the only discrepancy one could pick up from the confession. Otherwise counsel for the defence conceded that the 2nd Appellant made the statement to the magistrate and that the contents of the statement are a true reflection of what transpired on the 25th August 2003.

- [12] A trial-within-a-trial was then held in which Magistrate Rametse and Captain Schutte testified. The Magistrate confirmed the statement which was deposed to him by the 2nd Appellant. Captain Schutte denied ever assaulting the 2nd Appellant. He also refuted the fact that the 2nd Appellant could have been assaulted in his presence. He denied that he told the 2nd Appellant what to say to the magistrate. He never told the 2nd Appellant to mention the names of those with whom he

attempted to rob the shop. The 2nd Appellant testified that on the 22nd August 2003 he was taken from the police cells to Captain Schutte's office where he was made to lie on his stomach and a tube was placed around his face blocking his mouth and nose which suffocated him. He was told that if he does not tell the magistrate the truth – the same procedure would be repeated on a daily basis. According to him he was influenced by Captain Schutte what to say.

[13] The evidence indicates that the 2nd Appellant contradicted himself. When he testified in the trial-within-a-trial he said that everything he told the magistrate was properly recorded, but in his evidence in chief he denied some of the incidents. In the first place if Captain Schutte had told him to tell it all he could have mentioned the names of his collaborators. He could have told the magistrate the name of the person who pulled the trigger. Further Captain Schutte couldn't have known that AE Supermarket is also known as Banthu. He could not have known that one Chris was given information about money at the supermarket, although he says the name Chris was given to him by Captain Schutte. Moreover the name "Chris" does not appear in the list of the culprits and the witnesses.

[14] When evaluating the evidence of a trial-within-a-trial, the court is entitled to look at the evidence which was subsequently adduced. As already stated, in his evidence in chief the 2nd Appellant rejected some of the contents recorded by the magistrate in the confession, whereas during the trial-within-a-trial the contents were admitted as being a true reflection of what was said. It must be remembered that the 2nd Appellant said that he was not influenced in any other way although he had earlier said that the confession was not made freely and voluntarily. If anything at all, the 2nd Appellant could have been assaulted by Otto, Thulane and Nel before he came into contact with Captain Schutte.

- [15] A view has been expressed that the requirements of “freely and voluntarily” and “without undue influence” were distinct each of which had to be complied with as a prerequisite to admissibility – **S v Lebone 1965(2) SA 837 (A) at 844**. It can be said that there is certainly much force in the argument that the artificial interpretation of “voluntariness” at common law should be replaced by a more liberal construction so as to offer accused persons more protection against the reception of unduly influential statements. That construction is to be found in the words of Cameron J (as he then was) in **S v Marx & another 1996(2) SACR 140(W) AT 144(a-c)** in that what every criminal court now has to determine is “whether the administration of any evidence, including statements an accused has made to a police officer, will unfairly infringe his or her right to a fair trial.” under the Constitution. However, the requirements in **Section 219A of CPA**, that an admission be ‘voluntarily made’ by the accused before it may be admissible against him at criminal proceedings, was interpreted in **S v Yolelo 1981 (1) SA 1002 (A) at 1009** that it was a statutory provision which is a mere embodiment of the common law rule formulated in **R v Barlin 1926 AD 459 at 463**. With respect this interpretation may not comply with the requirements of the Constitution.
- [16] I raise this argument because the fact that the 2nd Appellant was assaulted by the police, which fact is reflected in his conversation before the magistrate, was not canvassed by the court *a quo*. This assertion is marred by the fact that the defence itself made a number of concessions on behalf of the 2nd Appellant. To exacerbate matters, the 2nd Appellant contradicted himself in his testimony. Had it not been for the contradictions in his testimony I do not think the confession could have passed the Constitutional muster.

[17] Although the 2nd Appellant has mentioned that there are faceless people who assisted him in committing the crimes, his confession cannot be imputed on any other person than himself. He can be linked to the commission of the crimes once the confession is admitted into evidence. He is also linked to the commission of the crimes in that he was a passenger in the Nissan bakkie which was used in the commission of the crimes.

[18] In my view the conviction of the Appellants based on the evidence of the identification as adduced by Kenneth Shongwe and Thabo Matloga cannot stand. Their evidence is unreliable and not credible for the following reasons: It was in the night and dark. The lighting and visibility were not good. Both of them didn't have prior knowledge of the Appellants. They didn't have the opportunity to observe both as to time and situation. They could not give a description of the faces, voices and dress of each of the Appellants. The two Appellants i.e. 2+4 were not pointed at the identification parade. In fact it was conceded by the State that the 4th Appellant didn't appear at the parade. It is trite that identification is circumstantial evidence. For circumstantial evidence and inference to be drawn there must be objective facts from which to infer the other facts which the court seeks to establish – **SV Cooper and others 1976 (2) SA 875(7) OF 888H**. In my view, the court *a quo* misdirected itself materially when it concluded that the 2nd and 4th Appellants were positively identified by Kenneth and Thabo. That conclusion cannot be sustained.

[19] On the other hand the 2nd Appellant is linked to the commission of the crimes in counts 4 and 5 through his confession. Their evidence that the 1st and 4th Appellants didn't drop anybody at the AE Supermarket must be rejected. The evidence of the State that the 1st and 2nd Appellants said they dropped a "woman and a man" at the shop must be accepted. The only inference that can be drawn is that they

dropped some of the perpetrators. That evidence therefore corroborates the 2nd Appellant's confession. In as far as the 1st Appellant is concerned, he was in the company of the 2nd Appellant and he was the driver of the motor vehicle. The said motor vehicle dropped certain people at the shop and later there was an attempted robbery and the deceased was killed.

- [20] I am not convinced that the 1st and 2nd Appellants can be convicted on Count 6. The 2nd Appellant's confession cannot be used to implicate other people. There is no evidence that establishes a link between the 1st and 2nd Appellants and the said two people who shot at De Beer. If one were to draw such an inference it may be too remote. One must be mindful of the fact that there are two other accused persons whose charges were withdrawn. Further if one were to apply the doctrine of common purpose, it will be in futile because the 1st and 2nd Appellants couldn't have foreseen that somebody who was not in the shop could have been shot at. The 1st and 2nd Appellants cannot be held responsible for the killing of De Beer. I must immediately say that the same logic applies to the 3rd and 4th Appellants.
- [21] The explanation of 3rd and 4th Appellants why their fingerprints were found on the Nissan bakkie within 72 hours cannot be accepted. The court *a quo* was correct in holding that they are linked to the conviction of the crimes in Counts 4 and 5. However, the 4th Appellant's fingerprints cannot be used to link him to the offences committed on the 9th August 2003. The 4th Appellant as already indicated above must be acquitted on counts 1-3. There is no evidence of recent possession on these counts.
- [22] On a proper evaluation of the evidence it cannot be said that the court *a quo* misdirected itself when it ruled that the 2nd Appellant's confession is admissible. Further on probabilities it can be accepted

that all the Appellants were involved in the commission of offences in counts' 4 and 5.

[23] Having said that I am of the opinion that the 1st Appellant's appeal on Count 6 should be upheld. His appeal on Counts 4 and 5 must be dismissed.

The 2nd Appellant's appeal on Counts 1, 2, 3 and 6 should be upheld. His appeal on Counts 4 and 5 must be dismissed.

The 3rd Appellant's appeal on Count 6 should be upheld. His appeal on Counts 4 and 5 must be dismissed.

The 4th Appellant's appeal on Counts 1, 2, 3 and 4 should be upheld. His appeal on Count 5 is dismissed.

Since the appeal is only on conviction no order is necessary with regard to the sentence.

[24] **In the circumstances I make the following order:**

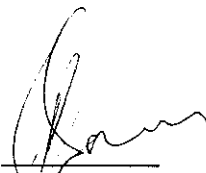
- (a) **Appeal in respect of the 1st and 3rd Appellants is upheld on count 6. Their appeal on counts 4 and 5 is dismissed.**
- (b) **Appeal in respect of the 2nd and 4th Appellants is upheld on counts 1, 2, 3 and 6. Their appeal on counts 4 and 5 is dismissed.**


TJ RAULINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

I agree


RG TOLMAY
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

I agree


A J BAM
ACTING JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT