

REPUBLIC OF SOUTH AFRICA



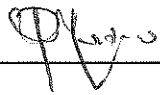
IN THE SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

CASE NO: A28/2013

(1) REPORTABLE:NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED:YES

30 AUGUST 2013

T P MUDAU



In the matter between

WILLEMSE, MACHIEL  
WILLEMSE, JACQUES

1<sup>ST</sup> APPELLANT

2<sup>ND</sup> APPELLANT

and

THE STATE

RESPONDENT

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J U D G M E N T

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MUDAU AJ:

[1] The two appellants were, notwithstanding their pleas of not guilty, convicted of murder in the Roodepoort Regional Court. The appellants appeared as accused 1 and 2 respectively with two others (accused 3 and 4). The ancillary finding was that the

degree of intent was *dolus eventualis*. In terms of s 51 (2) of Act 105 of 1997, the appellants were each sentenced to an effective sentence of 15 years' imprisonment in respect of the murder count. The appellants were also declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.

[2] The appellants now appeal against their convictions with leave of the court *a quo*. The grounds of appeal were essentially that the trial court erred in preferring the evidence of the State witnesses to that of the two appellants and their witnesses. Furthermore, it has been contended that the arrest of the appellants some three years after the incident is as a result of a police conspiracy.

[3] The primary question for consideration by this court is whether the court below correctly assessed all the factors relevant for purposes of judgment on the merits.

[4] It is trite law that a trial court's factual findings are presumed to be correct and that an appeal court will only interfere with the trial court's factual findings if such findings are clearly wrong or misdirected.<sup>1</sup>

[5] The trial relates to a sequence of events that took place on the night of the 4<sup>th</sup> and the early hours of the 5<sup>th</sup> March 2005 outside a bar in Florida, Roodepoort. The

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<sup>1</sup> See *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706; *Roux v Hattingh* 2012 (6) SA 428 (SCA).

deceased was on that occasion attacked and later died of his injuries on the 8<sup>th</sup> March 2005.

[6] It is necessary to briefly set out the material facts of the crime that the appellants were convicted of.

[7] The evidence adduced by the State regarding the circumstances leading to the deceased's death, consisted of the evidence of 5 eye-witnesses. The 5 witnesses in question are Jan Mans (the two accuseds' erstwhile friend), Lelani Jooste (Mans's girlfriend), Danie Britz (the night-club manager), Bianca De Klerk (accused 3's girlfriend) and Yolanda Louw (deceased's friend). The deceased and two of his friends, a couple, were on that day at Mike's Inn Tavern, Florida. Various other people were inside the club.

[8] An altercation ensued between the deceased and accused 3 inside the tavern. The altercation between the two continued outside after they were ordered outside by the club manager, Danie Britz. A fist fight broke out between accused 3 and the deceased. In the process of the fight between the two men accused punched the deceased who, as a result, fell on the tarmac road.

[9] Except for Danie Britz, the remaining 4 state witnesses testified that whilst lying on the tarmac, accused 3, and later accused 4 and the two appellants, kicked the deceased various times with booted feet. Britz however, testified that the two

appellants on the night in question at the club, where the incident happened. Britz further testified that when the incident occurred, he was busy locking up the premises and, at that point, had his back to the crowd that was milling about outside whilst waiting to head home as the club had now closed. He testified that he saw nothing untoward at this point but did sense that something was happening. He then testified that he headed to his car and saw accused running towards the deceased and hit him with a clenched fist. He testified that he saw accused 3 hit the deceased once which caused the deceased to fall to the ground. The deceased did hit his head but he testified that he saw no further assault on the deceased by accused 3 or anyone else. He then called an ambulance and as he was leaving, the ambulance arrived.

[10] Lelani Jooste, Mans's girlfriend, who was pregnant at the time, was at her request, driven home by accused 4 and Mans whilst the rest of the accused, including the appellants, were still assaulting the deceased.

[11] Similarly, of the women who were at the night club, some of them were involved in a physical fight outside the tavern. Mans had also testified that he had kicked the rear door of the motor vehicle whose occupants were the women involved in a fight as it drove past.

[12] All the state witnesses who gave eye witnesses' account were cross-examined extensively and in detail about the time of the incident, the role and manner played by each of the accused during the alleged attack on the deceased. The identification of the

accused during the incident took place in an area which was well lit. The witnesses maintained that the two appellants were involved in the attack on the deceased. Whilst one of the witnesses, Louw, confirmed that 1<sup>st</sup> appellant was one of the attackers, she testified that she could not remember the faces of the other attackers.

[13] The police officers who were involved in the arrest and investigation of the matter, as well as the arrest of the appellants, Captain De Bruin and Warrant Officer Ungerer, denied that there was any police conspiracy in the arrest of the appellants regarding this matter. An entry in the docket long before the investigating team was involved clearly showed that the deceased was attacked by more than one assailant.

[14] The two appellant's respective versions may be summarised as follows: they both denied that they were at the scene of the incident. Except for Mans, who once testified against them, they would not be drawn into speculations why they were implicated by the State witnesses.

[15] Jacobs, a defence witness, who also attended at the night club that night, testified that she never saw the two appellants at the scene. She witnessed a fight between De Klerk and the deceased's girlfriend during which Kingma, a defence witness came to De Klerk's defence. Of importance is that she never witnessed a fight between accused 3 and the deceased. In her testimony, Kingma stated that she did not see the appellants at the scene of the incident. Kingma however, further testified that her attention was on the fight between the women.

[16] Accused 3, Roberts, also testified in favour of the two appellants to the effect that his girlfriend, De Klerk, got involved in a fight with another lady. The deceased approached the two ladies who were fighting and bumped his girlfriend, De Klerk, as a result of which the latter fell. He, Roberts, then fought with the deceased who fell against the side of the pavement. When the deceased stood up, he punched the deceased again. The deceased again fell and at that point, Britz told him to stop. Roberts denied that the deceased was kicked and he also denied that the appellants were at the scene.

[17] The trial magistrate held that the State's version of events was the most probable. The defence version was accordingly rejected as false. As Nugent J said in *S v Van der Meyden*<sup>2</sup>

*"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."*

[18] It was argued that Mans was an accomplice and that the Court a quo should therefore have warned itself "... of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell

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<sup>2</sup> 1999 (2) SA 79 (W) (1999 (1) SACR 447) at 82D-E; *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at para [8]; *S v Trainor* 2003 (1) SACR 35 (SCA) at para [8]; *S v Stevens* [2005] 1 All SA 1 (SCA) at para [18]; and *S v Gentle* 2005 (1) SACR 420 (SCA) at para [27].

*lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth..."*<sup>3</sup>

The irregularity, if it is considered as such, was not of the order which per se vitiates a trial. In the words of the judgment in *S v Naidoo*, it cannot be said that there was "so gross a departure from established rules of procedure"<sup>4</sup> that the accused were not properly tried as the trial Magistrate also relied on the version of other supporting State witnesses. None of the witnesses, however, testified that Mans was involved in the assault and accordingly the court a quo did not have to caution itself in regard to his evidence.

[19] Whilst Britz had testified that the appellants were present, but did not participate in the attack, and was described by the defence as a neutral witness, his version in parts, may not be entirely reliable. Britz, to my mind had an interest in the matter that the incident should not attract adverse publicity, which might affect the business. Whilst he had little control that deceased died as a result of injuries outside the night club, reports of murder and fights amongst patrons, was clearly not good publicity. Britz therefore, had a motive to underplay what in fact happened as the trial court correctly found. On his own version, he was not present for the entire incident, his attention was diverted and he left before the assault concluded. He admittedly did not know what occurred after he left, which was at the time the ambulance arrived.

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<sup>3</sup> *R v Ncanana* 1948 (4) SA 399 (A) at 405.

<sup>4</sup> *S v Naidoo* 1962 (4) SA 348 (A) at 353D-F.

[20] It is not a reasonable possibility that all the State witnesses conspired falsely to implicate the two appellants. In my view, the nature of their evidence rules that out. The nature of the injury suffered by the deceased as supported by the medical doctors, who testified, is consistent with the version that the deceased was kicked on both sides of his head several times.

[21] In our law, the guilt of an accused falls to be decided with reference to his own acts and his own state of mind.<sup>5</sup> Given that the attackers were 4 in all, before accused 4 withdrew from kicking the deceased with booted feet, the trial court was justified in finding that the degree of intent was *dolus eventualis* and that the remaining accused acted in common purpose.<sup>6</sup>

[22] The trial Court was thus entitled in law to reach the conclusion that, whoever inflicted the fatal injuries, all were criminally responsible therefor. And the finding that the two appellants together with accused 3 acted in pursuance of a common purpose to assault the deceased by kicking him with booted feet and thus unlawfully, is fully supported by the evidence.

[23] Weighing up the evidence of the State witnesses in general against the evidence by the defence witnesses, my conclusion is that the appellants' denial of complicity in the events is not reasonably possibly true.

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<sup>5</sup> *S v Malinga and Others* 1963 (1) SA 692 (AD).



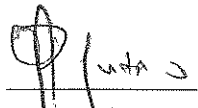
[24] The record demonstrates quite unequivocally that the trial court's factual findings are correct. The court cautioned In *Rex v Dhlumayo and Another* at page 594 (above) that:

*"An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered."*<sup>7</sup>

[25] In my view, there is also no misdirection on the part of the court *a quo* in the factual findings and the conclusions reached, which entitles this appeal court to interfere with the convictions. The contradictions complained of are minor in nature and do not detract from the material allegations by the State witnesses.

[26] In the result I propose the following order:

The appeal against the convictions by the two appellants is dismissed.

  
Mudau AJ

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<sup>6</sup> *S v Sigwahla* 1967 (4) SA 566 (AD).

<sup>7</sup> See above at footnote 1.

I agree

A handwritten signature in black ink, appearing to read 'Weiner J', written over a horizontal line.

Weiner J

*Date of hearing: 30 August 2013*

*Date of judgment: 30 August 2013*

*Counsel for Applicant: Adv Kriel*

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*Counsel for Respondents: Adv Bester*

*Attorneys for Respondent: Public Prosecutors, South Gauteng High Court*