IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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

13 JUNE 2014
DATE

SIGNATURE

CASE NUMBER: A883 / 2012

13/6/14

In the matter between:

TSHIDI MATLALA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MAVUNDLA J

[1] The appellant was convicted and sentenced by Makgoka J on count 1 of murder and sentenced to 20 years imprisonment; on counts 3 and 4 respectively, robbery with aggravating circumstances as intended in s1 of Act 51 of 1977, and sentenced to 8 years imprisonment on each count; on count 5 unlawful possession of a firearm and sentenced to 5 years imprisonment and on count 6 unlawful possession of ammunition was sentenced to 2 years imprisonment. It was ordered that the sentence imposed in counts 4, 5 and 6 shall run concurrently with sentence in count 3.

[2] The appellant now appeals against the conviction with the leave of the court a quo having been granted against conviction only.

[3] It needs mention that the appellant together with his co-accused were duly legally represented throughout the trial. The appellant, as well as his co-accused, pleaded not guilty to all the counts. They exercised their right of silence. They were

warned of the implication of the provisions of s51 (1) Act 105 of 1997 (The minimum sentence Act).

[4] The conviction of the appellant is a sequel to the unlawful and intentional killing of the deceased Kgashane Patrick Lebea at Modubung Village on the night of the 29th July 2005. It is common cause that the deceased died as the result of gunshot injuries he sustained on the 29th July 2005.

[5] The conviction of the appellant on the two counts of robbery was a sequel to the robbery of Mrs. Mmakoma Julia Malatje (the victim in count 3) and her daughter Ms Moloto Sulphina Malaja (the victim in count 4) at Modubung Village on the night of the 29th July 2005. It is common cause that the incident occurred at an isolated and unlit area.

[6] The conviction of the appellant on counts 5 and 6 arises from the fact that in the murder and robbery charges a firearm was involved.

[7] The issue in respect of the murder and robbery charges is whether the identity of the appellant was proven beyond reasonable doubt by the State[1].

[8] In respect of counts 5 and 6, the possession of firearm and ammunition, the issue is whether the appellant can be convicted on possession on the basis of common purpose.

[9] The conviction of the appellant was premised on the evidence of Mr. Sefora Tshepo Evans, the former co-accused with the appellant, against whom the State withdrew charges in terms of

[1] *Vide S v Shackell* 2001 (2) SACR 185 (SCA) at 194g-i; *S v Mafiri* 2003 (2) SACR 121 (SCA) at 125c-d; *S v Jochems* 1991 (1) SACR 208 (A) 211j.

section 204 of the Criminal Procedure Act 51 of 1977 as amended. As an accomplice, his evidence must be approached with measure of caution[2]. It is so because, as an insider, he may manipulate the evidence to suit his design. The court, in approaching the evidence of an accomplice, must be wary of the danger of convicting on the evidence of an accomplice, as he can tell a lie to sound like the truth, motivated by the desire to save himself from prosecution. After all said and done, the court must be satisfied that the truth has been told by the accomplice[3].

[10] The state also relied on the evidence of the victims of the two robbery charges. Their evidence is also subject to cautionary rules relating to identification. The question of visibility, illumination, opportunity to see and observe the perpetrator, prior knowledge of the perpetrator, etc, are factors to be taken

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[2] *R v Ncanana* 1948 (4) SA 399 (A). at 405.

[3] *R v Manda* 1951 (3) SA 158 (A) at 163 C-E; R v Mokoena 1956 (3) SA 81 (A) at 85-6; E v Lesedi 1963 (2) SA 471 (A) at 473F,

into consideration in determining whether the state has proven the identity of the accused person, *in casu*, the appellant.[4]

[11] Another state witness, whose evidence the state relied upon to secure the conviction of the appellant, was Kgangelo Sarah Mokgomolo, a former girlfriend of accused 1 known as Thabiso Thabo Moloto. Her evidence also is subject to the same cautionary rules applicable in question of identification[5]. In her case, as a former girlfriend of accused 1, she may have a motive, to either give false evidence to implicate the former boyfriend to settle a score or to have him acquitted. It is therefore necessary that her evidence also be approached with a measure of caution.

[12] It needs mention, for whatever is worth, that the appellant's co-accused number 1 did not testify, save for calling his father as a witness. For purposes of this appeal it shall not be

[4] *S v Mthetwa*1972 (3) SA 766 (A) 768A-C.

[5] Carlous v S 2008 (3) ALL SA 321 (SCA) at 325.

necessary to refer to the evidence of the father to the co-accused. The appellant took the stand in his own defence.

[13] According to Ms Mokgomolo on the night in question she was at Majesa Liquor Restaurant tavern, so too was accused 1. He refused her request to accompany or see her off. She eventually left alone. She shortly thereafter, saw accused 1, Tshepo (the s204 witness) and the appellant walking down another road. She saw them accosting the deceased. She was about 20 meters away from them. The three assaulted the deceased. The deceased inquired from accused 1, calling by his name Thabiso, that he is assaulting him. She saw accused 1 shooting the deceased who was lying on the ground. She heard four gunshots. The trio then left the place to pick up schoolbags and ran away. She could see them clearly because nearby there was light from a machine which illuminated the place.

[14] According to Ms Mokgomolo, shortly thereafter, she saw the trio walking in the direction of from where the two ladies (the robbery victims) were coming. She saw accused 1 and Sefora approaching the two ladies. The old lady (whom she referred to as Nkome's mother) was pointed with a firearm but could not see who was pointing. I must hasten to point out that her evidence of two people approaching the two ladies accords with the version of the two robbery victims as well as that of Sefora. At that moment, Ms Mokgomolo was about 30 meters from where the robbery was taking place. Her evidence, however, does not accord with that of Sefora who said that it was accused 1 and the appellant who approached the two ladies.

[15] Under cross examination she said that there were three schoolbags, one was brown in colour. Taking into account the fact that it was at night, in my view, it is probable that the brown bag might in fact be the red schoolbag mentioned by Sefora. Her evidence that accused 1 shot the deceased corroborates that of Sefora. Her evidence also accords with that of Sefora that all three accosted the deceased.

[16] Responding to the court's questions Ms Mokgomolo said that where the deceased was attacked, there was a school and light nearby, illuminating the area. She could see the trio around the deceased clearly because she was at a spaza shop at the same school from which the light came.

[17] According to Sefora, on the night in question, he was with accused 1 (Thabiso) and the appellant (Tshidi). The three had two firearms, one in possession of Thabiso and the other appellant.[6] They accosted the deceased. Sefora searched the deceased and took his wallet. A R10.00 note fell. The appellant hit the deceased who fell to the ground. Accused 1 shot the deceased twice. They left and later shared an amount of R1800.00 they found in the deceased's wallet.[7]

[18] Sefora further testified that, after they left the scene in count 1, they came across two ladies, an old and a young one. The

[6] Paginated pages 18 lines 13-23, 19.

[7] Paginated pages 19 et 20 lines 10-19.

appellant and accused 1 pointed the two ladies with firearms. Sefora took an amount of R30.00 from the old lady, and earrings, a necklace chain (sic), cell phone and R10.00 from the young lady. Sefora and the appellant took the young lady with them to the mountain, where Sefora took a red jersey from the young lady and placed it in a schoolbag. They allowed the young lady to leave. The two returned to the village where they joined Thabiso. There were two cell phones which were taken by the appellant with the intention to sell.

[19] Under cross examination Sefora said that accused 1 was also present at the mountain. He further explained that they left Thabiso at the hillock in the village, wherefrom, he and the appellant then proceeded to the mountain.[8]

[20] It is common cause that the two ladies were robbed on the night in question and also that the young lady was taken to the mountain by two people. Sefora also conceded that he made a

[8] Paginated page 34 lines 14-22 of volume 1-84 of the record.

statement to a magistrate which is exhibit E that "Tsidi and Thabiso" searched the deceased and took his wallet containing money. He further conceded that he told a lie in his statement to the magistrate. His explanation was that he wanted to have the two arrested and prosecuted for the robbery.

[21] According to Mrs Malatje, while she and her daughter were walking, they were accosted by one person who pointed her with a firearm and demanded a cell phone and money. He searched her and took R30.00. He instructed her to run and she obliged, leaving behind her daughter. The place was dark, as a result, she was unable to see the culprit clearly to be able to identify him.

[22] According to Ms Malatje, they were robbed by two people who also took her to the mountain where she was later released. Her evidence so far, in my view, is corroborated by that of Sefora. She however, pointed out accused 1 in identification parade and also at court[9]. Her evidence with regard to accused

[9] Paginated page 66 line 10-

1 at the mountain does not correspond with that of Sefora who said that accused 1 was left at the hillock. Of importance is the fact that, both the young lady and her mother did not identify the appellant as one of the men who robbed them.

[23] According to Sefora, both accused 1 and the appellant pointed firearms at the two ladies. However, the two ladies only made mention of one person pointing them with a firearm. This is in my view, a material contradiction which should have generated doubt in the mind of the court.

[24] The version of the appellant was a denial of any involvement in the alleged crimes. He however, placed himself at the Majesa tavern on the day in question.[10] He also placed himself at Modubung when he accompanied his aunt at about 20h00[11]. The court *a quo* rejected his version and found him guilty on all counts.

[10] Paginated page 161 lines 2.

[11] Paginated pages 165 lines 10-page 167 line6, p168 line13.

[25] I am of the view that, the contradictions referred to herein above, in so far as the robbery charges are concerned, are of material nature that they cannot be overlooked, in deciding whether the state has proven the guilt of the appellant beyond reasonable doubt. It is trite that where there is any doubt on the part of the court, then the accused person must be granted the benefit of such doubt and be acquitted. I am of the view that the *court a quo*, in convicting the appellant on the robbery counts misdirected itself . The court *a qou* should have found that the state has not proven the guilt of the appellant beyond reasonable doubt in both robbery counts 3 and 4. This court is therefore at large to interfere on both robbery counts and set them aside. It stands to reason that the sentence of 8 years in respect of each of these counts must also be set aside.

[26] Mr. Sefora's in his evidence stated that accused 1 shot the deceased. Sefora searched the deceased and took his wallet. Under cross examination he conceded that this version

contradicts his earlier statement made to a magistrate, (exhibit E).

[27] The evidence of Sefora that he, together with accused 1 and the appellant accosted the deceased is corroborated by the evidence of Ms Mokgomolo. The trial court, quite correctly, in my view, found that these two witnesses corroborated each other in respect of the attack and killing of the deceased. The trial court proceeded to find that the state proved the guilt of the appellant in respect of the murder charge. There is no basis to interfere with this finding and therefore the appeal on this conviction must fail.

[28] The evidence of Sefora was that all three had two firearms and accused 1 shot the deceased. According to Sefora, the appellant had one of the two firearms. Ms Mokgomolo corroborated Sefora that accused 1 had a firearm and shot the deceased. Assuming for a moment that the evidence of Sefora that the appellant had a firearm, should not to be accepted, the

appellant cannot, nonetheless, escape conviction on both counts 5 and 6, possession of firearm and ammunition respectively. The facts are that the deceased was robbed by one of the gang of three, in the immediate presence of the other two gang members; they all left the scene together. It is inescapable in these circumstances not to infer that they all acted in common purpose in the robbery and murder. The one, who possessed the firearm, must have possessed the firearm on behalf of the other, to execute a grand plan of robbery. The appellant was part of the gang and failed to present a reasonable explanation to show that the firearm was not in his possession. On inferential basis and on common purpose he was in possession; *vide S v Mbuli* [12]decision which was re-iterated by the Supreme Court of Appeal in *Molimi v The State*[13] In my view, the appellant was quite correctly convicted on counts 5 and 6. I therefore conclude that the appeal on count 5 and 6 must fail.

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[12] 2003 (1) SACR 97 (SCA) at para 71.

[13] [2006] SCA 38 (RSA) para [37].

[29] The leave to appeal was granted only against conviction. The court a quo ordered that the sentence imposed in counts 4, 5 and 6 shall run concurrently with sentence in count 3. However, count 4 and 3 stand to be set aside. What remains is the fact that the sentence imposed in count 5 and 6 still remain running concurrently.

[30] The court *a quo* found that the s204 witness was a satisfactory witness and proceeded to grant him indemnity from prosecution for the crimes related to this case. The state has requested this court, to reverse the aforesaid indemnity from prosecution. I am of the view, that where the state intends to request the appeal court to overturn the indemnity against prosecution granted, it must serve a notice to the s204 witness, informing him or her of its intention. In the absence of such a notice and the concerned witnesses, the court will decline to entertain the request of the state. It must be borne in mind that the concerned person has a right to be heard before an adverse

order against him can be made. The request is therefore refused.

[3] In the result the following order is made:

AD CONVICTION

1. That the appeal in respect of count 1 is dismissed and the conviction and sentence of 20 years is confirmed.

2. That the appeal against conviction on counts 3 and 4 respectively is upheld and the conviction on both these counts is set aside and the respective sentences of 8 years in each count are set aside;

3. That the appeal against the conviction in respect of counts 5 and 6 is dismissed and the conviction on both counts 5 and 6 is confirmed.

[4. That the sentence imposed in count 5 is ordered to run concurrently with the sentence imposed in count 6;

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree

A C BASSON

JUDGE OF THE HIGH COURT

I agree

N JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT

DATE OF HEARING	**: 11 JUNE 2014**
DATE OF JUDGMENT	**: 13 JUNE 2014**
ATT FOR THE APPELLANT	**: PRETORIA JUSTICE CENTRE**
COUNSEL FOR THE APPELLANT	**: ADV M TLOUWANE**
ATT FOR THE RESPONDENT	**: DPP**
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