

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: A58/2016

Date: 9 November 2016

Not reportable

Not of interest to other judges

Revised.

In the matter between:

**SICELO MATABANE
NONKWENKWE GANDA
GABARONE AARAM PHETO
VUSI MOKATAKA**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT**

And

THE STATE

RESPONDENT

JUDGMENT

PRETORIUS J.

(1) The four appellants appeared in the Regional Court, Oberholzer, in the Gauteng region on 4 May 2015 and was convicted on 8 October 2015 and sentenced on 9 October 2015.

(2) They appeared on the following charges:

"Count 1: Robbery with aggravating circumstances read with the provision of the colloquially named Minimum Sentences Act 105 of 1997.

Count 2: Sexual assault in contravention of Section 5(1) read with other relevant provisions of the Sexual Offences and Related Matters Act 32 of 2007.

Count 3: Murder read with the provisions of the Criminal Law Amendment Act 105 of 1997."

They were sentenced as follows:

"Count 1: Each 15 years' imprisonment;

Count 2: Each one year imprisonment;

Count 3: Each life imprisonment."

(3) This is an automatic appeal in terms of section 10 of the **Judicial Matters Amendment Act**¹ to this court due to the fact that life imprisonment was imposed on all four appellants.

(4) All appellants were legally represented at trial.

BACKGROUND:

(5) Mr Isaac Nqoko testified for the State that on 16 May 2014 he and his friends, Mazama and Thulani, were on their way from church at approximately 20h00. They were walking next to Relabogili Secondary School when they met a group of boys. One member of the group approached the witness and stabbed him and robbed him of his cellphone. He could not identify any of the group of boys who numbered more than ten. Both his friends could not identify any of the perpetrators, although Mr Thulani Thlapi testified that he saw Dimakatso, the State witness, at the scene.

(6) Ms K. M. testified as the complainant in count 2. Her evidence was that she was in the company of the deceased, Mr Mandia Nkosi, at approximately 23h30. They were walking and he was taking her home. She then saw eight people approaching them.

¹ Act 32 of 2013

They searched her and took her cellphone and money. She ran to Mandia and saw one of the group members stabbing him, after which he ran away. Mandia jumped over the fence of her home and fell inside the yard. He passed away as a result of the stab wound in his neck. She did not testify that she had been raped. Her evidence was that two of the group members approached her. The person dressed in a skinny pink jean and a white cloth top touched her breasts, put his hand inside her bra and kissed her on her cheeks.

(7) The next witness for the State was Ms Dimakatso Mabono. She was not warned that she would be testifying as a witness in terms of section 204 of the **Criminal Procedure Act**.² The magistrate only made the following observation after she had been sworn to tell the truth:

*"COURT: The Court can even explain to her the Court can indemnify her from prosecution in counts of either robbery and [indistinct] assault if she gives honest [indistinct] satisfactory --- Understand Your Worship."*³

She testified that:

*". . .she was with the four Appellants at the Second Appellant's (Nonkwenkwe's) place of abode smoking dagga and Nyaope and thereafter it was agreed that they should go and rob people. They armed themselves with knives and bottles and they indeed robbed people they met in the street."*⁴

(8) According to her evidence they were five people when they attacked the complainants. Her evidence regarding the first attack was that they were five people and that they attacked a group of four people, two males and two females and all four were stabbed and one robbed of his wallet and phone. There was no evidence that the attack in the first charge had taken place in such a manner or that any such an attack had taken place. Her further evidence was that accused 1 had a bottle with which he stabbed someone and that person never testified in court. In evidence in chief, her evidence was that whilst she was in the company of the four appellants in the vicinity of a school two boys appeared and the second and fourth appellant robbed them. She gave evidence that she was able to see everything as she was standing next to the appellants. This is

² Act 51 of 1977

³ Record page 28 line 25 to page 29 line 2

⁴ Appellants Heads of Argument, paragraph 14

in contrast to her evidence that she had stood at the corner of the street and could not see everything. Her evidence and that of Ms K. M. differ completely. Ms M. testified that eight people had approached her and the deceased, whilst Dimakatso was adamant that they were only five. Ms M.'s evidence was that the deceased was stabbed in the street and then he jumped over the fence into the yard, whilst Dimakatso's evidence is that the deceased and the lady entered a yard, the appellants followed and attacked them in the yard, where the deceased was stabbed.

(9) In her statement to the police Dimakatso said that the lady was struck with a bottle, but in her evidence, under cross-examination she said the lady was not assaulted, they only touched her private parts. Ms M.'s evidence was that she could not identify any of the appellants in court as being the people who had attacked her.

(10) Dimakatso's further evidence was that the first appellant had stabbed the deceased, but during cross-examination she conceded it was a lie as she was waiting in the street and did not see this happening.

(11) The evidence of the defence was that Dimakatso and appellants 1 and 2 were together at appellant 2's place where they were all smoking dagga. A certain Nene joined them. Both appellant 3 and 4 were not present according to appellants 1 and 2's evidence, this was confirmed by all appellants when testifying.

ACCOMPLICE EVIDENCE:

(12) It is trite that the court should warn itself of the danger of convicting upon the evidence of an accomplice, even more so where the accomplice's evidence is the only evidence linking the appellants to the crimes.

(13) In **S v Hlapezula and Others**⁵ Holmes JA formulated the cautionary rule, as applied to accomplices as:

*"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. **First, he is a self-confessed criminal. Second, various considerations may lead him falsely to***

implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) **the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular ...**" (Court emphasis)

These principles apply even more so in the present case where Dimakatso had not been properly warned in terms of section 204 of the Criminal Procedure Act⁶.

(14) In **S v Makeba and Another**⁷ the court held:

*"It is clear from the authorities that if corroboration was required it had, for the purpose of the so-called cautionary rule, to be corroboration implicating the accused and not merely corroboration in a material respect or respects. (See Ncanana's case at 405; R v Mpompotshe and Another 1958 (4) SA 471 (A) at 476; S v Avon Bottle Store (Pty) Ltd and Others 1963 (2) SA 389 (A) at 392.) I would like to emphasise that, as was pointed out by Schreiner JA in Ncanana 's case supra at 405, **it is not a rule of law or practice that requires the Court to find corroboration implicating the accused, but what is required is that the Court should warn itself of the peculiar danger of convicting on the evidence of the accomplice and seek some safeguard reducing the risk of the wrong person being convicted, but such safeguard need not necessarily be corroboration.** Once, however, the Court decides that in order to be so satisfied it requires corroboration, it would be pointless to look for corroboration other than corroboration implicating the accused."* (Court emphasis)

⁵ 1965(4) SA 439 (A) at 440 D - H

⁶ *Supra*

⁷ 2003(2) SACR 125 (SCA) at paragraph 12

(15) The State set out in the heads of argument the following in relation to Dimakatso, the accomplice's evidence:

*"Dimakatso's evidence was found wanting in a number of respects. She gave thoughtless answers. Nonetheless she provided satisfactory answers for her thoughtless answers."*⁸

And

*"She could not provide a satisfactory answer why she testified that each of the victims was stabbed by each appellant."*⁹

And

*"She could also not provide a satisfactory answer why she testified that each of the four appellants stabbed the four people that they first met and robbed ..."*¹⁰

And finally,

*"It is respectfully submitted that there are quite a number of contradictions in the evidence of the State however they do not materially affect the credibility of the witnesses."*¹¹

It is clear from her evidence that she contradicted herself on numerous occasions and was a very unsatisfactory witness. These contradictions are material as it impacts directly on the crimes the appellants had allegedly committed.

(16) If the formulation as set out in **Hlapezula**¹² and **Makeba**¹³ is taken into consideration and applied to the present case, it is clear that the State has not proven its case against the appellants beyond a reasonable doubt.

(17) This court cannot find under these circumstances that the magistrate had not misdirected himself in accepting Dimakatso's evidence and convicting the appellants as charged on her evidence without any corroboration. It does not mean that this court finds that the crimes were not committed. On the contrary the crimes were committed and Dimakatso evidently was an accomplice, but due to her evidence being littered with contradictions and improbabilities the court cannot rely on her evidence at all to find that

⁸ Respondent's Heads of Argument paragraph 10

⁹ Respondent's Heads of Argument paragraph 11

¹⁰ Respondent's Heads of Argument paragraph 12

¹¹ Respondent's Heads of Argument paragraph 19

¹² *Supra*

the appellants were the perpetrators. The State conceded as much during argument when referred to the heads of argument and numerous material contradictions by Dimakatso, by the court.

(18) Therefor the appeal of all four appellants must succeed.

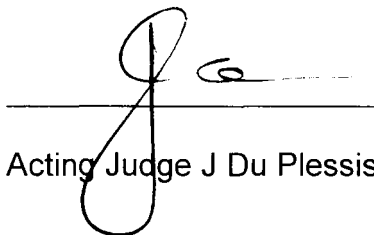
(19) In the result the following order is made:

1. The appeal against conviction and sentence is upheld;
2. All four appellants' convictions and sentences are set aside.

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

Judge C Pretorius

I agree.

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

Acting Judge J Du Plessis

Case number : A58/2016

Matter heard on : 31 October 2016

For the Appellants : Adv RS Matlapeng
Instructed by : Pretoria Justice Centre

For the Respondent : Adv BE Maoke
Instructed by : Director of Public Prosecutions

Date of Judgment :