REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

15/7/2016
CASE NO: A126/15

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

SIGNATURE ..... 15/07/16 DATE

MFANAFUTHI WONDERBOY SKHOSANA Appellant

and

THE STATE Respondent

JUDGMENT

TEFFO, J:

[1] The appellant was convicted in the regional court, Heidelberg, of murder and attempted murder. He was sentenced to 20 years imprisonment for murder and 10 years imprisonment for attempted murder. The court further ordered that the sentence of 5 years imprisonment imposed on the charge of attempted murder, should run concurrently with the sentence imposed on the count of murder. Effectively the appellant had to serve a sentence of 25 years imprisonment. He now

appeals against his conviction and sentence leave having been granted by the trial court.

The appeal against conviction

[2] The issues raised in the appeal against conviction were that the trial court erred in finding that the State proved its case beyond a reasonable doubt. It was argued that although the appellant did not testify, that did not relieve the State of its duty of proving its case beyond a reasonable doubt. A submission was made that the evidence of Mr Petrus Engelbrecht and Mr Thabang Mosweli, was not credible. It was pointed out that even if the trial court found that the appellant's alibi was false, that did not make the appellant the perpetrator of the offences. It was further submitted that the mere fact that the appellant did not testify, had been held against him. It was accordingly pointed out that the regional court's evaluation of the evidence was flawed and misdirected.

The appeal against sentence

[3] A submission was made on behalf of the appellant that the trial court erred in sentencing him to an effective term of 25 years imprisonment. It was argued that the trial court erred in over-emphasising the seriousness of the offence and the interest of society while under-emphasising the personal circumstances of the appellant. The trial court did not put any weight, so it was argued, to the period of time the appellant spent in custody while awaiting trial. It was accordingly pointed out that the sentence imposed is shockingly disproportionate to the offences.

[4] The State disagreed with the submissions made on behalf of the appellant on both conviction and sentence. It was argued on behalf of the State that the appellant was correctly convicted on the two offences and that the sentence imposed is justified.

The evidence

[5] The State called three witnesses, namely Mr Petrus Engelbrecht, Mr Thabang Mosweli and Ms Refilwe Theresa Molau in support of its case, while the appellant did not testify and/or call any witness in defence of the allegations against him.

[6] Mr Petrus Engelbrecht testified that on the night of 27 to the morning of 28 November 2010, he was at Nigel at the old beer hall where he resided. He was in the company of his deceased brother, Mr Hans Engelbrecht, sleeping in their room. At approximately 24:00 he heard people fighting in front of the beer hall. Suddenly someone came to their room, approached the deceased and fought with him with fists. He woke up from his sleep and noticed that Sugarboy was busy assaulting the deceased. Sugarboy was carrying a hammer in his hand. At the time he wanted to stand up to go and help his brother, he realised that Sugarboy had already injured him.

[7] Sugarboy also fought with him with the intention to injure him. The hammer fell from his hand. He ran for it, picked it up and came to him. He pushed him to the bed repeatedly and he fell on his knees. He subsequently hit him with the hammer at the back on the middle part of his head and he lost consciousness. He fell on the bed, could not do anything and eventually woke up at the hospital where he was treated for the injuries he sustained during the incident.

[8] He spent three days at the hospital. His brother later passed on. He knew the appellant prior to the incident. He met him in town. In the room where he was attacked together with his deceased brother, there was no electricity but a candle light was on when the incident took place. There was also moonlight outside. The appellant kept him and his brother busy for a period of between 35 to 45 minutes. The appellant was wearing a black jean, a blue top and a hat. He never saw the appellant again after the fight but only started seeing him in court.

[9] Under cross-examination he testified that he knew the nickname of the appellant as Sugarboy and Two boy. When told that the appellant would testify that he did not know the two nicknames, he said many people including his friends knew the appellant as Wonderboy, Sugarboy and Two boy. Prior to the incident he did not

know the appellant's real name. He only knew him by sight. He saw him 3, 4 or 5 months prior to the incident. When the appellant entered their room on the night of the incident he knew it was Two boy. He met the appellant many a times prior to the incident at Jabula tavern where he used to work with his deceased brother. He could not say which year but said it was not the year of his brother's death. Later on he said it could have been in September 2009. Prior to the incident he had taken four bottles of 750 ml Reds cider. He disputed that he made a mistake that it was the appellant he saw in his room, who fought with his deceased brother and him. When told that the appellant was in custody from October 2009 to 18 November 2010, he was adamant that although he cannot say which month, he saw the appellant in 2009. It was put to him that the appellant would testify that after his case was finalised in Nigel on 18 November 2010, he went to stay with his sister in Orange Farm. He reiterated that he personally saw him in his room fighting with him and his deceased brother. He further stated that it was him who injured him and his deceased brother.

[10] Mr Thabang Mosweli also testified. His evidence was briefly as follows: On the night of 27 to 28 November 2010 at midnight, he was at the old Nigel beer hall sleeping. A certain male person who he heard people calling him Two Boy, arrived at the beer hall and broke one of the windows that was not being used. Subsequently he went to speak to the old woman in one of the rooms in the building. Later on he heard him speaking in the deceased and Mr Petrus Engelbrecht's room. He did not see him assaulting the Engelbrecht brothers in their room. He had visited his brother at the building. As he lit a cigarette, the appellant approached him and asked him what did he want there. He explained to him that he was from Tsakane and that he came there to visit his brother. As and when he spoke to him, he grabbed him with his hair. He left him, asked for a cigarette and left. When he spoke to him his candle light was on. Their conversation could have lasted for 5 minutes. He did not know his name but used to see him walking on the street. He could have seen him two to three days before the incident. He was wearing short pants and black grasshopper shoes. He never saw him again after the incident but was seeing him in court.

[11] As and when the appellant went to speak to other people in the building he could not hear properly what they were saying but heard when he was speaking to the old woman where mention was made of the two Engelbrecht brothers. The old woman that the appellantspoke to, passed on.

[12] When told under cross-examination that the appellant would testify that he was never at the beer hall that night, he was with his sister in Orange Farm, he was adamant that it was him and said when he grabbed him with his hair, he told him that he was Two Boy from Newcastle and that his surname was Skhosana. He further testified that as he was assaulting the two Engelbrecht brothers, they were calling each other with their names until the other one just went quiet while the other one continued screaming. When he woke up in the morning, he saw that the two Engelbrecht brothers were injured. His further evidence was that the appellant was in the company of a certain lady who was left outside when he entered the building. In the three months preceding the incident, he saw the appellant at least 3 or 4 times. Although he saw him, the appellant was not the person he was used to.

[13] He conceded that the appellant was in prison from October 2009 to November 2010 as he heard from people who knew him saying he came from prison. He heard that the appellant and the deceased were fighting for Manyani. He heard that the deceased had a love relationship with Manyani and when he was hit with a hammer, he was asked why did he have a relationship with Manyani. When the appellant was assaulting the two Engelbrecht brothers, Manyani was outside the building crying.

[14] Ms Refilwe Theresa Molau testified as follows: The appellant is her ex-boyfriend. He is the father of her children. She also knew the deceased. He was working at Jabula tavern at night. She also knew the deceased's brother, Mr Petrus Engelbrecht. On 27 November 2010 she was also at Jabula tavern in Nigel. Upon her arrival at the tavern, she went to sit with her friend. Afterwards she went to the toilet. She saw the appellant sitting with his friends while she was on her way to the toilet. The appellant greeted her and she responded. She went into the toilet. When she came out of the toilet, the appellant called her. She did not go to him, instead, she went to join her friend for some time and later on she went out. She

requested one Fox to accompany her to Elra Park. She left the tavern with Fox. She did not see the Engelbrecht brothers at Jabula tavern that night.

[15] Under cross-examination she testified that Jabula tavern and the old beer hall are far away from each other but the distance is not long. She testified that she left Jabula tavern after 24:00 but before 01:00. She disputed that the appellant was not in the Nigel/Aura Park area on 27 and 28 November 2010 and that he visited his sister at Orange Farm. She maintained that she saw the appellant on 27 and 28 November 2010 in the night. The court asked her how did she remember the two days as the incident happened a long time ago, she said during at the time of the incident she had relocated to Mpumalanga. A day after the incident she left to Mpumalanga and two days later, she received a call where she was informed that the police were looking for her. She did not have a relationship with any of the Engelbrecht brothers. They were just friends.

[16] The appellant closed his case without testifying and/or calling any witnesses. This completes the summary of the evidence led in the regional court.

[17] The crux of this appeal revolves around the identification of the appellant as the perpetrator of the offences committed. It has been argued that the trial court should not have relied on the evidence of Mr Petrus Engelbrecht and Mr Thabang Mosweli when it made its findings as their evidence was not credible and reliable.

[18] In ***R v Shekelele and Another 1953 (1) SA 636 (T)*** at 638F-G the court remarked that honest but mistaken identification frequently caused gross injustices. To avoid such injustices the court remarked that in all cases that turn on identification of an alleged offender by a witness, the greatest care should be taken to test the evidence. A bold statement that the accused was the one who committed the crime, is not enough. Answers to relevant questions about the culprit's physique, complexion, peculiar features and wearing apparels, if not properly interrogated, just like an untested and unexplored bold statement which has not been inquisitively investigated, can leave the door wide open for the reasonable possibility of a big mistake.

[19] In ***S v Mthethwa 1972 (3) SA 307 (A)*** at 768A the court said the following:

"...because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight, the proximity of the witness, his opportunity for observation, both as to the time and the situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait and dress, the result of the identification parade, if any, and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors or such of them that are applicable in a particular case are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities."

[20] Both Mr Petrus Engelbrecht and Mr Thabang Mosweli testified that they knew the appellant by sight. Mr Petrus Engelbrecht further testified that he saw the appellant many a times prior to the incident at Jabula tavern where he previously worked. Coupled with this evidence he also stated that he saw the appellant 3, 4 or 5 months prior to the incident. He also mentioned that he last saw the appellant in September 2009 at Jabula tavern. When he was told under cross-examination that the appellant was in prison from October 2009 to 18 November 2010, he testified that although he could not remember the month he could have seen him in 2009. According to his evidence he and his deceased brother used to work at Jabula. From his evidence there are many versions. Firstly, he stated that he saw the appellant many a times at Jabula tavern prior to the incident. Secondly, he saw him 3, 4 or 5 months prior to the incident and thirdly, he last saw him in 2009. The incident took place on 27 November 2010. If Mr Petrus Engelbrecht last saw the appellant in 2009 as he testified, that could not have been 3, 4 or 5 months prior to the incident. His evidence needed to be interrogated further as it was not clear. Further to this evidence I find it strange that if Mr Petrus Engelbrecht last saw the appellant in 2009 suddenly someone entered their room at night and he boldly said he knew it was the appellant. He did not give any description of the appellant. All what he stated was that he was wearing a black jean, a blue top and a hat. He did not say whether he was able to see his face, could not explain how the appellant

was and there was no evidence to indicate which side of the appellant was he. He did not say which side of the appellant was he able to observe to boldly say it was him. Nowhere in the evidence did he mention that he observed the appellant's face. There is nothing in his evidence that said up to where on the appellant's head and face did his hat sit and whether the hat did or did not obscure his face.

[21] Further to this evidence it is important to note that both Mr Engelbrecht and Mr Mosweli mentioned that in the rooms where they were when they saw the appellant, there were no electricity lights but only a candle light was on. Mr Engelbrecht also mentioned the moonlight. Illumination from a candle light is not as clear as light from an electric light and neither can the moonlight provide such illumination. This coupled with the circumstances under which the two state witnesses observed the appellant, *viz*, the fact that Mr Engelbrecht was drunk, was awaken from his sleep by the fight, he did not state how or what he observed from the person who attacked him and his brother, the period that he alleged he last saw the appellant, and the mobility of the scene, puts his identification of the appellant in doubt.

[22] Mr Mosweli's evidence regarding the identity of the appellant was also not convincing. His evidence was that he came to the beer hall where the incident took place on the day of the incident but also mentioned that he saw the appellant on the street two to three days prior to the incident. I find it strange that the assailant could have told him his name as he testified under the circumstances of what was happening at the time. He also did not give a description of how the assailant looked like. At some stage during cross-examination he testified that he saw the appellant at least 3 or 4 times in the three months preceding the incident. His description of the clothes that the assailant was allegedly wearing is different from what Mr Engelbrecht said he was wearing. Mr Mosweli mentioned the short pants and grasshopper shoes while Mr Engelbrecht mentioned the black jeans, a blue top and a hat. It is surprising that while Mr Petrus Engelbrect testified that the assailant had a hat on, Mr Mosweli did not see it. The assailant only spent 5 minutes with Mr Mosweli according to his evidence.

[23] I must mention that there were material contradictions in the evidence of Mr Mosweli and Ms Molau (the last state witness). Mr Mosweli's evidence was that the appellant was in the company of Ms Molau at the beer hall. According to him when the appellant was busy fighting with the Engelbreacht brothers inside the building, Ms Molau was outside the building, crying. Ms Molau disputed that she was in the company of the appellant on the night of the incident. She testified that she saw him at Jabula tavern but did not go to him even though he called her. She eventually left with one Fox to Elra Park.

[24] Nugent J in ***S v Van den Meyden 1999 (1) SACR 447 (W)*** at 449C – 450B said the following:

"Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent but what is required to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him cannot both be true. There is not even a possibility that both might be true, the one is possibly true only if there is an equivalent possibility that the other is untrue..... The proper test is that an accused is bound to be convicted if the evidence established his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must account for all the evidence. Some of the evidence 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."

[25] In ***S v Chabalala 2003 SACR 134 (SCA)*** at 140A-B it was held that when dealing with the criminal trial, the correct approach is to weigh up all the elements which points toward the guilt of the accused against all those that are indicative of his innocence, taking proper account of the inherent strength 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 doubt to the accused's guilt.

[26] In ***S v Boesak 2001 (1) SA 912 (CC)*** at para [24] the court said the following:

"The fact that and accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the court, in ***Osman and Another v Attorney-General, Transvaal****, when he said the following: ' Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove the guilt of the accused beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of the criminal justice.'"*

[27] The state relied on the cases of ***R v Biya 1952 (4) SA 514 (A)*** and ***Abader v S 2010 (2) SACR 558 (WCC)*** and argued that where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. It was further pointed out that the fact that an accused does not have to prove his alibi does not meant that he may not need to present evidence which may support the alibi. In the end, the test is still whether, in view of the totality of the evidence, the State proved its case beyond a reasonable doubt and whether the accused's version is reasonable possibly true.

[28] In the present matter the appellant raised an alibi at plea explanation and this alibi was put to all the state witnesses that testified. Ms Molau, was adamant that she saw the appellant at Jabula tavern on the night of the incident as against what was put to the state witnesses by the appellant's counsel that he was in custody from October 2009 to 18 November 2010 when he was released and that he went to reside with his sister at Orange Farm. Although it was argued on behalf of the appellant that if Ms Molau left Jabula tavern before 01:00 where the appellant was still sitting with his friends, he could not have also been at the beer hall at the same time. That argument has no merit in that none of the state witnesses were sure about the times or said they looked at their watches. Those times were estimated times.

[29] The trial court could have been correct in rejecting the alibi of the appellant on the basis of the evidence of Ms Molau that she saw him at Jabula tavern but what is crucial is whether the appellant's identification at the beer hall on the night of the incident by Mr Petrus Engelbrecht and Mr Mosweli was proved beyond a reasonable doubt. I have analysed their evidence *supra* and have found them to be lacking.

[30] It may very well be that the appellant was involved in the commission of the offences but the evidence that he was seen at the beer hall by Mr Engelbrecht and Mr Mosweli is just a mere suspicion. The fact that the appellant was seen at the tavern does not necessarily mean that he is the person who committed the offences at the old beer hall. In the absence of the evidence by the State proving the identity of the appellant as the perpetrator at the beer hall on the night in question beyond a reasonable doubt, the court is left with the doubt in its mind as to whether the appellant was properly identified as the perpetrator.

[31] In my view the evidence that was adduced by the State with regard to the identification of the appellant at the beer hall was poor. That evidence accordingly did not call for an answer from the appellant. His failure to testify can therefore not be used against him. In my view in the face of the State's unsatisfactory evidence, failure of the appellant to testify did not advance the State's case in anyway. Failure by the appellant to testify, did not take away the onus which rested on the State to prove his guilt beyond reasonable doubt.

[32] In my view the trial court erred in accepting that the evidence of Mr Petrus Engelbrecht and Mr Mosweli was credible and reliable in so far as the identification of the appellant as the person who committed the offences on the night of 27 November 2010 at the old Nigel beer hall. I am persuaded considering the totality of the evidence that the State failed to prove the identification of the appellant as the perpetrator on the night of the incident at the Nigel old beer hall beyond a reasonable doubt. The trial court has therefore misdirected itself by convicting the appellant on both counts. Its findings are patently wrong. (***S v Hadebe and Others 1997 (2) SACR 641 (SCA)***).

[33] It is therefore my view that the appellant could not be convicted on the basis of a mere suspicion. The State has to prove his guilt beyond a reasonable doubt.

[34] I find it unnecessary to deal with the issue of sentence.

[35] In the result I make the following order:

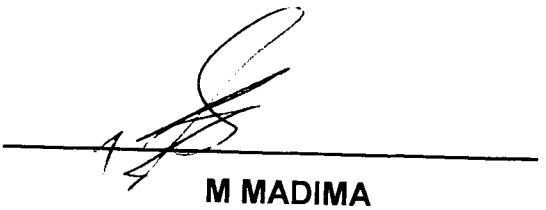
35.1 The appeal against the conviction and sentence of the appellant is upheld;

35.2 The conviction and sentence of the appellant by the court *a quo* are set aside and replaced with the following:

"The accused is found not guilty and discharged."

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree



M MADIMA

ACTING JUDGE OF THE HIGH COURT SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances:

For the appellant	:	MB Kgarara
Instructed by	:	Pretoria Justice Centre
For the Respondents	:	H Creighton
Instructed by	:	The Director of Public Prosecutions

HANDED DOWN ON 15 JULY 2016.