HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

22/01/2016.

CASE NO: A750/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

22/01/2016

DATE SIGNATURE

IN THE MATTER BETWEEN

PM MASILELA	**FIRST APPELLANT**
AT SEOPELA	**SECOND APPELLANT**
SM MASINGA	**THIRD APPELLANT**
and	
THE STATE	**RESPONDENT**

JUDGMENT

LEGODI J

[1] This matter came on appeal before this court against the convictions of and sentences imposed upon the three appellants in the High Court circuit division for the Lydenburg district respectively on 15 April 2013 and 11 June 2013.

[2] The appellants were charged with three counts namely murder, robbery with aggravating circumstances and kidnapping. All three appellants were convicted in respect of all three counts. Appellants 1 and 2 were each sentenced to 20 years' imprisonment on count one (murder), 10 years' imprisonment on count two (robbery with aggravating circumstances); and 3 years' imprisonment on count three (kidnapping). Appellant 3 was sentenced to 10 years' imprisonment on count one, five years' imprisonment on count two and 3 years' imprisonment on count three. The court ordered in respect of all the three appellants that the sentences on all counts be served concurrently.

[3] The appellants were represented by Adv Kgagara. On their behalf he, *inter alia*, submitted the following: The main witness on behalf of the prosecution relating to the events in question as well as the three appellants were all found by the court *a quo* to be unreliable witnesses. Consequently, so it was argued, the prosecution has failed to prove its case beyond a reasonable doubt and the appellants should have been acquitted. In respect of sentence it was submitted that although the court found substantial and compelling circumstances to be present, the sentences were still harsh and disproportionate to the circumstances of the offences. It was further submitted that the trial court erred in over-emphasising the seriousness of the offences and the interest of society whilst the personal circumstances of the appellants were under-emphasised. Lastly, it was submitted that the sentences imposed were shockingly harsh and induced a sense of shock.

[4] On behalf of the prosecution Adv GJC Maritz submitted that the approach and findings of the court *a quo* cannot be faulted and that both the conviction and sentence should be upheld.

[5] I shall briefly refer to the events of the night of 17 July 2009 and the early hours of the next day which led to the charges against the appellants. After work on 17 July 2009 Mr Lalifa Shumba ("the deceased"), left his home in Lydenburg to go to a tavern in town. He used the red Nissan double cab vehicle belonging to his employer. He probably remained at the tavern the whole evening until closing time at approximately 02:00 on 18 July 2009. In the next few hours the deceased was kidnapped, brutally murdered and his car taken. The court *a quo* found that the three appellants were guilty of all the charges levelled againgst them.

[6] It is not possible to establish exactly the finer details of the events that followed the deceased leaving the tavern and this was due to the three appellants, and the one state witness who were present at all times and testified about the events, lying about what exactly happened. Each tried to exonerate himself and to blame the others. Despite being unable to come to a definite conclusion as to the role played by each of the appellants, the court *a quo* found them to have acted with a common purpose in respect of all the charges levelled against them and accordingly convicted them.

[7] To continue with the events during the early morning hours of 18 July 2009: The deceased was apparently very drunk when he left the Tavern in the company of at least some of the appellants and was possibly too drunk to drive his own vehicle. There was no evidence that he was carried to the vehicle nor that there was any struggle between him and the appellants. It must therefore be assumed that he voluntarily got into his vehicle and handed the keys of the vehicle over to one of the appellants. Appellants 1, 2 and 3 were in the vehicle. So was the state witness Mr Elmond Kganane and possibly a fifth person by the name of Tsietsi. Mr Kganane was initially also charged with the appellants but the charges

were withdrawn against him and eventually he testified as a state witness in terms of section 204 of the Criminal Procedure Act.

[8] As far as Tsietsi was concerned, Mr Kganane denied that he was present during the night in question. The three appellants, however, said that Tsietsi was present and in fact placed most of the blame of what occured, on him. Tsietsi, if he was present, was never arrested and prosecuted.

[9] It is common cause that appellant 1 was the driver of the vehicle when they left the tavern. Instead of going to the house of the deceased in Lydenburg, they drove in a south-westerly direction towards the towns of Dullstroom, Belfast and Middelburg. According to the appellants they did so because Tsietsi told them that they were on their way to Middelburg to drop the deceased off at his house.

[10] They stopped at the town of Dullstroom, some 58 km from Lydenburg, where they poured in petrol at the Engen filling station. They drove further in the direction of Belfast. At some point they stopped the vehicle next to the road. The deceased was attacked and dragged from the vehicle and brutally assaulted until he was dead. His body was dragged through the veldt and left tangled in a wire fence. The appellants drove back and stopped again at the Engen filling station on the way back to Lydenburg.

[11] In Lydenburg, and apparently on the way to Burgersfort, which is to the north of Lydenburg, the vehicle for some reason left the road and one of the tyres sustained a puncture in the process. Whilst still standing around the vehicle, the police arrived. It was approximately 05:00 on the morning of 18 July 2009, some three hours after they had left the tavern. The police enquired whether anybody had been injured but they were reassured by the appellants that everybody was in good health and that the owner had left for his home to fetch a wheel spanner to fix the flat tire. Shortly afterwards a tow truck also

arrived. The driver of the tow truck was given the same information and eventually both the police and the tow truck left the scene. The next day, appellant 1 told the driver of the tow truck, who was known to him, that a man was assaulted and left on the road between Dullstroom and Belfast. The tow truck driver informed his employer of these facts and eventually the police were contacted.

[12] The cause of death of the deceased was, according to a report on the post-mortem examination, head injuries and a broken neck. A bit more should be said about the deceased and the injuries which he sustained during the attack on him. He was not a big man being only 1,64 metre tall and weighing 61 kilograms. He was 33 years of age. His injuries were the following: Two deep lacerations on the back of his head of respectively 6,3 cm and 2,1 cm; crumbling fractures of the back of the head; brain bleeding and brain oedema with serious brain injury; a deep wound on his left forehead; a deep bruise with haematoma of the chest; contusion of both lungs; fractures of the 5th, 6th and 7th ribs on the right side and of the 3rd, 4th and 5th ribs on the left side; 895 ml of blood was found in the chest cavity; a broken neck with fractures of the C6 and C7 vertebrae; bleeding in the structure of the neck. The report also noted that the trousers and underpants of the deceased were pulled down to underneath the knees. This can in fact also be seen on the photograph taken from the body at the scene where it was left in the veldt.

[13] In his judgement Hiemstra AJ, as he then was, referred in quite some detail to the evidence of each of the witnesses. In my view he gave a fair reflection of their evidence and it is not necessary to go through the same exercise. I agree with his acceptance of the evidence of all the prosecution witnesses except for the evidence of Mr Kganane. Mr Kganane gave a full and detailed version of the events which implicated all the three appellants but, in respect of his own actions, he exonerated himself completely. This part of his evidence was clearly false. According to Mr Kganane, the vehicle came to a stop next to the road whereupon appellant 1 dragged the deceased from the vehicle and trampled him on the head and kicked him on the head with his boots. Appellant 3 also kicked him and hit him with a bottle on the back of his head. Appellant 2 hit the deceased on the back of his head with a brick or a stone of approximately 45 cm in length. Appellant 3 eventually grabbed the deceased and pulled him into the grass where he was left. According to Mr Kganane he had nothing to do with the assault on the deceased.

[14] Although the evidence of Mr Kganane was found not to be credible by the trial court, his description of the assault on the deceased finds remarkable support in the post-mortem examination report as well as some of the photographs taken of the scene and of the deceased's body. Firstly, the fractures of the two neck vertebrae and of the ribs on both sides of the chest and the resultant bleeding in different parts of the body, could, on the probabilities, only have come from attackers kicking and jumping on the deceased as testified by Mr Kganane. The wounds on the front and back of the head were deep and serious and would seem to be more compatible with the use of shoes or other blunt instruments, than the hands. One of the photographs also shows a brick with blood on, lying in the grass next to the road, which is similar to the object which Mr Kganane described.

[15] The police found evidence which indicated that the initial part of the assault took place right on the edge of the tarred road surface where blood was found. More blood and the bloodied brick was found approximately 2 to 3 metres from the side of the road. More blood was found further into the veldt in the direction where the deceased's belt was found. More blood was also found in the direction of the place where the body of the deceased was eventually found.

[16] The deceased's belt was found approximately 17,7 metres further into the veldt which must have come off during further assaults and/or the dragging of his body through the veldt. The numerous blood drops all the way from the road up to where the body was eventually found, which is a distance of approximately 38,2 metres, is probably an indication that the deceased finally passed away at the place where he was left. This is supported by the fact that on post-mortem examination a lot of blood was found in the lungs, the chest, the neck and the head areas.

[17] All the appellants denied any knowledge of the kidnapping, robbery and murder of the deceased. According to appellant 1, he was simply the driver who was asked to drive the vehicle to Middleburg and back in order to take the deceased home. He denied any knowledge of the attack on the deceased. His version was that the moment he stopped on or beside the road to allow some of them to answer the call of nature, he fell asleep and was unaware of anything until he heard the doors close again and he was told to drive off. According to appellant 2 he was asleep from the moment they left the filling station in

Dullstroom on their way to Middelburg until the accident when the accident occured back in Lydenburg. According to appellant 3 he was also asleep throughout and knew nothing of any attack on the deceased.

[18] The trial court considered the evidence of the appellants as well as the other evidence presented at the trial. In rejecting the evidence of the appellants as untrue, especially as far as the attack on the deceased, the robbery and kidnapping is concerned, the court referred to numerous examples of conflicting evidence and evidence which is so improbable that it has to be rejected as untrue. So, for example, none of the appellants could explain why, drunk as they were, at 02:00 at night, in the middle of winter, desperately wanting to go home, they nevertheless were prepared to accompany an unknown man on a trip of approximately 320 kilometres. The evidence that they were all asleep and totally unaware of the brutal and obviously prolonged attack on the deceased, is so improbable that it has to be rejected out of hand. Incidentally, it was put to Mr Kganane during cross-examination on behalf of appellant 1 that it was not him, appellant 1, who had dragged the deceased from the vehicle but that it was Mr Kganane himself and Tsietsi who had done so. Such evidence on behalf of appellant 1 is totally contradictory to his later version that he was unaware of anything that had happened at the roadside. The trial court also remarked on the appellants being remarkably lucid regarding the details prior to the murder which does not support their claim of such extreme inebriation that they fell asleep at the roadside and being unaware of what was happening. I agree with the conclusion of the trial court that the appellants were not as drunk as they would have the court believe. They were simply lying and each tried to exonerate himself and/or to blame the others.

[19] It is not necessary to refer to the numerous other improbabilities and contradictions in the evidence of the appellants nor the effect of the evidence of the other state witnesses on the versions of the appellants. None of them survived cross-examination. I agree with the analysis of the evidence and the findings made by the trial court in rejecting the evidence of the appellants as untrue as far as the main issues in dispute are concerned.

[20] I also agree with the findings of the trial court that on the evidence the deceased had given no one permission to drive his vehicle away from his home in the direction of Middelburg. I consequently agree with the finding that all the appellants embarked on this journey for a common purpose. They probably wanted to get as far away as possible from

Lydenburg before they left the deceased's body. That is why they drove past the next town of Dullstroom before they stopped.

[21] The trial court was aware that there was no clear evidence as to the role played by each of the appellants in the crimes committed, especially in respect of the murder of the deceased, and that it had to rely on surrounding circumstances and the proven or common cause contingent facts. Since there was no evidence of a prior agreement to commit the crimes, the court had to decide whether the appellants actively associated themselves with the crimes committed. In this regard reference was made to *S v Mgedezi* 1989 (1) SA 687 (A) paragraph 161 at p 705-706 and the requirements mentioned in order to find a common purpose.

[22] The trial court found that all the requirements have been met and I agree. All the appellants were present at the scene and were clearly aware of of what was being done to the deceased. As to the question whether the appellants had the intention to make common cause with whoever perpetrated the deed, the court must decide the issue by inferences drawn from the proven and undisputed facts. Firstly, none of the appellants disassociated himself from the deed. None of them reported the matter to the police as they said they wanted to do, despite ample opportunity to do so. In fact, when the opportunity came when the police arrived at the scene of the accident and also when the driver of the tow truck arrived later, they lied to the police and the tow truck driver on separate occasions by telling them that they know the owner and that he had gone to fetch a wheel spanner to fix the flat tire. It is obvious why they told the lie about the owner of the vehicle - it was to hide their crimes and to reassure the police and to get them to leave the scene.

[23] This was a deliberate lie of a material fact and as such constitutes evidence of a guilty conscience and a knowledge that the truth will implicate them. The only reasonable inference to be drawn in these circumstances is that the appellants had intended to make common cause in the commission of the offences. These actions by the appellants is a manifestation of the sharing of a common purpose. They all actively lied to the police to protect themselves and to avoid exposure and by doing so showed their association with what had been done earlier that night. I am therefore satisfied that the appellants were correctly found guilty of kidnapping and murder.

[24] As far as the charge of robbery is concerned, I am not satisfied that the appellants were correctly convicted. Robbery consists of theft of property by unlawfully and intentionally using:

(a) violence to take the property from somebody else; or

(b) threats of violence to induce the possessor of the property to submit to the taking thereof. (See definitions in *Hunt Milton 642 and Burchell and Milton 817*). It is customary to describe the crime briefly as 'theft by violence'. (See *R v De Jough* 1959 (1) SA 234 (A) 238 C-D; *S v Benjamin* 1950 (1) SA 950 (A) 958H). Therefore the elements of robbery can be summed up as follows:

(a) the theft of property;

(b) through the use of either violence or threats of violence;

(c) a causal link between the violence and taking of the property;

(d) unlawfulness;

(e) intention. (see *Criminal Law 5th Edition* by CR Snyman at 517).

[25] The underlining is my emphasis. The deceased was very drunk when he left the Tavern in the company of at least some of the appellants. He was possibly too drunk to drive his own vehicle. There was no evidence that he was carried to the vehicle nor was there evidence that any struggle ensued between him and the appellants.

[26] There is no evidence that at the time the appellants left the tavern, they intended to steal or rob the deceased of his vehicle. There was a suggestion in the course of the evidence during trial that the appellants intended to take the deceased to his home as he could not drive. Instead of taking him to his home they drove towards the direction of Dullstroom. It could well be that they only decided to steal the car when they took the direction towards Dullstroom.

[27] In this case, it does not matter whether the vehicle was taken before or after the murder. The one critical element of robbery is the use of 'violence to take the property from somebody else' or 'the threats of violence to induce the possessor of the property to submit to the taking of the property'. There was no evidence of violence used to take the vehicle from the deceased nor was there any evidence that the deceased was threatened with violence to induce him to hand over or submit to the taking of the vehicle by the appellants.

[28] The trial court seems to have relied on circumstantial evidence in convicting the appellants on the robbery charge. Before I deal with circumstantial evidence in the present case, it is necessary to deal with the nature and reliance on circumstantial evidence generally. The living general principle relating to circumstantial evidence was long stated in *R v Blom* 1939 AD 188 at 202 and 203 as follows:

"a The inference sought to be drawn must be consistent with all proven facts. If it is not, the inference cannot be drawn,

b. The proven facts should be such that they exclude every reasonably inference from them save the one sought to be drawn. If they do not exclude other reasonable inference, then there must be a doubt whether the inference sought to be drawn is correct'.

[29] In *R v De Villers* 1944 AD 493 at 508 it was held that a court should not consider each circumstance in isolation and draw inferences from each single circumstance. The onus on the state is not to prove that each separate item of evidence is inconsistent with the involvement of the accused, but that taken as a whole, the evidence is beyond reasonable doubt inconsistent with such innocence.

[30] Insofar as the trial court appears to have made its finding based on the evidence of the wife of the deceased, I find it necessary to deal with her evidence in the context of the proven facts:

(a) The deceased was taken out of his vehicle at the road side between Dullstroom and Belfast,

(b) Outside his vehicle, the deceased was viciously assaulted by the appellants, and sustained injuries as set out in paragraph 12 of this judgment,

(c) The police found evidence which indicated that the initial part of the assault took place right on the edge of the tarred road surface where blood was found,

(d) Blood and bloodied brick was found approximately 2 to 3 metres from the side of the road,

(e) More blood was found further into the veldt in the direction where the deceased's belt was found; and

(f) More blood was also found in the direction of the place where the body of the deceased was eventually found.

[31] The description of the blood and where it was found, as set out in paragraphs 15 and 16 of this judgment, is critical insofar as the trial court might have drawn an inference that the deceased was assaulted in the vehicle based on the circumstantial evidence of the deceased's wife. Her evidence was to this effect: At the scene where the deceased's vehicle was found, one of the deceased's shoes was found inside the vehicle. The deceased's jacket with blood and his cap were also found a distance away from the vehicle.

[32] The fact that the deceased's cap and one shoe were found around the scene where the vehicle was found, does not prove that the deceased was ever assaulted inside the

vehicle, and if so, assaulted with the intention to take the vehicle from him by force. He was at all material times at the back seat of the vehicle. Furthermore, the fact that a jacket with blood was found does not prove that the deceased sustained injuries and bled whilst inside the vehicle and before he was taken out of the vehicle. It could well be that the jacket was taken off the deceased at the scene where his body was found and took it out of the vehicle after the collision in order to conceal blood on the jacket and the appellants' involvement in the murder of the deceased.

[33] Even if the deceased was assaulted in the vehicle, without more, it cannot be inferred that the intention for the assault was to take the vehicle by force or threat. There was no need to use force in order to take the vehicle as the appellants were already in control or possession of the vehicle. In the absence of any reliable evidence pointing to the deceased wanting to regain possession of his vehicle, no inference can be drawn that force was used. I would therefore uphold the appeal on a charge of robbery with aggravating circumstances and substitute the conviction on count 2 with conviction on theft being a competent verdict of robbery.

[35] Coming to the appeal against sentence on charges of murder and kidnapping they were each sentenced to 20 years and 3 years respectively. Having regard to the circumstances under which the offences were committed and having regard to the personal circumstances of each of the appellants as alluded to in the trial court's judgment, I find no merit in the appeal against sentences imposed on counts 1 and 3. The trial court having found existence of compelling and substantial circumstances had the discretion in imposing any sentence it considered to be an appropriate. A court of appeal will not easily interfere with an exercise of discretion unless it was improperly exercised. As regards count 2, that is, robbery with aggravating circumstances, each one of the appellant was sentenced to 10 years imprisonment, the trial court having found that there were compelling and substantial circumstances. Upholding the appeal on this charge and substituting it with conviction on theft, makes it necessary to reconsider the sentence of 10 years imprisonment afresh. Having regard to their personal circumstances and the circumstances under which the offence was committed, I find that 7 years imprisonment is appropriate.

[36] Consequently an order is hereby made as follows:

36.1 The appeals of the appellants against conviction and sentence in count 1, (murder charge); and count 3 (kidnapping charge), are dismissed.

36.2 The appeal of all the appellants in respect of conviction and sentence on count 2 (robbery with aggravating circumstances) is hereby upheld and both conviction and sentence on count 2 are set aside and substituted as follows:

"36.2.1 ***The accused are found guilty of theft on count 2 being a competent verdict of robbery with aggravating circumstances;***

36.2.2 ***On count 2 (Theft) the accused are hereby sentenced to seven years imprisonment.***

36.2.3 The sentence of 7 years on count 2 to run concurrently with the sentence on the murder charge in count 1."

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M F LEGODI

JUDGE OF THE HIGH COURT

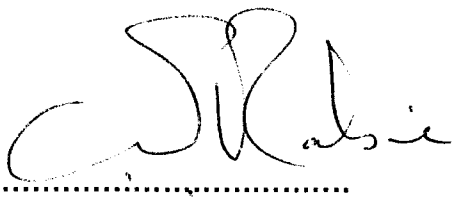
I agree

.....

J R MURPHY

JUDGE OF THE HIGH COURT

I agree



C P RABIE

JUDGE OF THE HIGH COURT

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