

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

8/9/16

Case No: A734/15

In the matter between:

KENNETH PHILEMON RADEBE

1st Appellant

THEMBA THOMAS MAHLANGU

2nd Appellant

SIMPHIWE PAUL NKOSI

3rd Appellant

BERNARD TSHEPHO DITSHEGO

4th Appellant

and

THE STATE

Respondent

JUDGMENT

MPHAHLELE, J

- [1] This is an appeal against the decision of this court sitting as the Middelburg Circuit Court, which found the appellants guilty on six charges, namely:
- 1.1 Murder read with section 51(1) of Act 105 of 1997;
 - 1.2 Attempted murder;
 - 1.3 Robbery with aggravating circumstances read with section 51(2) of Act 105 of 1997;
 - 1.4 Unlawful possession of a firearm; and
 - 1.5 Unlawful possession of ammunition.
- [2] The appellants were sentenced to terms of imprisonment in respect of each count and an order was made that the sentences should run concurrently. This appeal is against conviction only and is before us with leave of the court *a quo*.
- [3] All the charges emanate from an incident that occurred on 31 December 2009 at approximately 20h00 in the evening at a shop at or near Leslie in Mpumalanga. Armed gunmen robbed a shop owned by one Mr. Ulungu Bubakali Osman (Mr. Osman), a Somali citizen. The shop is situated in the yard of one Ms. Stella Mbonani (Ms. Mbonani). In the course of the robbery, Ms. Mbonani and one Mr. James Gizacho Nbavalt, a worker at the shop, were shot and injured. Mr. Osman was killed. The armed robbers took cash and a Motorola cell phone and then fled the crime scene.
- [4] It is common cause that the events took place as mentioned above, the only issue is the identity of the attackers.
- [5] There is no direct evidence linking the appellants to the commission of the offences and the appellants were convicted on circumstantial evidence presented by the State. The following evidence was led before the court:

5.1 Ms. Hessie Stella Mbonani testified that on 31 December 2009 at approximately 20h00 she went to the tuck shop owned by Mr. Osman. This tuck shop was in her garage next to her house. She rented the garage to two gentlemen who were the tuck shop owners. She bought airtime and asked one of them to load it in her phone. Ms Bonani said that she noticed an unknown man in a blue lumber jacket next to the pay phones. Suddenly she heard someone saying "shoot" and then she heard a sound after which the shop owners fell down. Ms Bonani fell down as well and felt dizzy. She thereafter heard the sound of a plastic bag and coins. A few minutes later she came to her senses and saw the two men on the floor in a pool of blood. She ran to her house where she locked herself in until the police arrived. Ms. Bonani testified that she was injured on both her knees and spent the night in hospital. She could not identify any of the robbers and further could not tell as to how many robbers were involved.

5.2 Mr. Samyelo Joseph Mnguni (Mr. Mnguni) was called as the second state witness. He was duly warned in terms of section 204 of the Criminal Procedure Act 51 of 1977. During his evidence he denied any knowledge of the robbery and testified that he did not know the accused persons. He testified that the investigating officer assaulted him and promised him R30 000.00 to give evidence according to a statement they gave him to sign.

5.3 Mr. Aaron Vusi Moyo testified that he is the investigating officer in this matter. He denied that he assaulted or bribed the witness to sign a statement and give false evidence. He further testified that he was not the officer who took the statement from Mr Mnguni. Joseph Phiki Sibanyoni testified that he is a Lieutent Colonel in the South African Police Service. He was requested by the investigating officer to take a statement from Mr Mnguni. Lt Col Sibanyoni testified that he wrote the statement while Mr Mnguni related his version to him. This was read back to Mr Mnguni where after it was signed.

5.4 Upon application by the State, Mr. Mnguni was declared a hostile witness.

5.5 Mr. Sipho Johannes Masina (Sipho) testified that he resides in Leslie. He knew all four accused because they stayed in the same area. On the 31st December 2009 at approximately 20h30 he was with his brother Isaac and a friend, Peter. They were drinking beer, wine and listening to music when there was a knock at the door and someone called out his name. When Sipho opened the door he found the 3rd appellant standing there. The 3rd appellant entered and four other men followed. Sipho identified the five men as the appellants and Mr Mnguni. The 3rd appellant took out cash notes from his trouser pocket and the 1st appellant took out coins from his pockets. No-one else produced money. Sipho also noticed a green bag and a plastic bag on the bed and he heard coins inside. The 1st appellant was in possession of a firearm. He took out the bullets from the firearm. The men were discussing how to share the money amongst each other. Shortly after the accused entered the room there was another knock on the door and two police officers entered. Both police officers were armed and pointed the men in the room with firearms. The police asked who robbed the Somali tuck shop. The one police officer was known to the Sipho as Mthuli. The appellants then ran past the police officers and out of the room. The police officers then gave chase. Sipho took the bullets from the ground and threw them out of the door. Approximately 10 minutes later the 3rd and 4th appellants returned and took the bags with money and the firearm.

5.6 Mr. Isaac Sipiwe Masina (Sipiwe) testified that he is Sipho's brother. He confirmed that he was with his brother and one Peter in the room on the day in question. They were drinking beer and listening to music when there was a knock on the door. The four appellants and Mr Mnguni entered the room. They had one bag with them. The 1st appellant was in possession of a firearm and he took out bullets from this firearm. The 1st, 2nd, 3rd and 4th appellants all produced money notes. There was another knock on the door and then two police officers entered. The five men ran away leaving behind the bag with coins, bullets and firearm. Sipho took the bag, bullets and firearm and threw them out of the room. He left the room to go to his mother. When he returned Sipho told him that the 1st and 2nd appellants returned to the room to collect the money.

5.7 Mr. Pieter Naude testified that he is a police officer stationed at the Leslie police station. On 31 December 2009 they received a report of a robbery at a

family tuck shop. When they reached the tuck shop he found the two owners on the floor in a pool of blood. One of the men was visibly dead while the second man was alive and moaning. They also found Ms Mbonani in her house and she was extremely traumatized. Blood and fingerprints from a DVD player were collected on the scene by the police. Photographs of the scene were also taken.

5.8 Mr. Malesela Alfred Tema testified that he is a Warrant Officer in the service of the Leslie Police. On 31 December 2009 he was on duty and received a report of a robbery that had taken place. He, along with his colleagues went to the tuck shop, but on their arrival some police cars drove away and they followed these police cars. Approximately 60 meters further these cars stopped and Warrant Officer Tema and his colleague got out of the vehicle. They noticed the 1st and 2nd appellants who were running towards them. Warrant Officer Tema grabbed the 2nd appellant and his colleague grabbed the 1st appellant. He searched the 2nd appellant but did not find anything in his possession. The 1st appellant was searched by his colleague and money was found in his possession. The two appellants were then placed in the police vehicle and taken to the police station. The 1st appellant was wearing white tekkies with stains which appeared to be blood on them. The tekkies were confiscated and placed in a plastic bag.

5.9 Mr. Maluse Philemon Monghalo testified that he was a volunteer police officer and was on duty on 31 December 2009. They received a report of a robbery and went to the tuck shop where the incident occurred. The police got out of their vehicles to surround the premises when they received a further report of other possible suspects. Mr Monghalo and Warrant Officer Tema walked into a passage when they heard something like people jumping over a fence. Then he saw the 1st and 2nd appellants walking towards them. Warrant Officer Tema grabbed the 2nd appellant while Mr. Monghalo grabbed the 1st appellant. He searched the 1st appellant and found a bundle of money and paper in front of the 1st appellant's pants. He handed this money to Colonel Giyani.

5.10 Mr. Antonio Humphrey Thamsanqa Mahlangu, a constable in the service of the South African Police testified that he found the 1st appellant in the cells after his arrest and he searched him. He found R540-00 in the small

pocket of the 1st appellant's trousers. Some of the notes appeared to be blood stained. He asked the 1st appellant about the firearm used during the robbery. The 1st appellant denied that he was involved and told constable to go to Sipho where he will find the firearm. Constable Mahlangu went to Sipho who gave him four bullets. During cross examination it became clear that constable Mahlangu only got involved in this matter 21 days after the arrest of the 1st appellant.

5.11 The state closed its case and thereafter an application in terms of section 174 of the Criminal Procedure Act was brought on behalf of all the appellants. This application was dismissed by the court. The 1st and 2nd appellants closed their case without giving evidence or calling witnesses to testify on their behalf.

5.12 The 3rd appellant testified that on 31 December 2009 he visited Sipho and his brother. Peter was there as well. The 3rd appellant was adamant that he arrived at Sipho's room alone and denied that he was in the company of the other appellants or Mr Mnguni. While they were smoking dagga the police arrived and asked if they did not see people running past. He told the police that he did not see anyone running past the room and then the police left.

5.13 The 4th appellant testified that on 31 December 2009 he was at home and has no knowledge of the robbery of the tuck shop and murder of the owner.

[6] In assessing the merits of this appeal, the court must apply the principle regarding circumstantial evidence enunciated in *R v Blom* 1939 AD 188 at 202 -204.

1. the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

2. the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct.

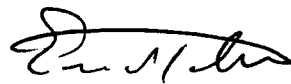
- [7] As mentioned before, whilst the appellants were busy discussing between themselves about the sharing of the money, the police officers appeared at the door. Upon enquiry about the robbery at the tuck shop, the appellants all ran away leaving the bag and the firearm behind. The appellants ran away even though the police accused no one of the robbery. The 3rd and 4th appellants returned later to fetch the firearm and the money.
- [8] The 1st and 2nd appellants were arrested shortly after the robbery in the vicinity of the crime scene. The 1st appellant was found in possession of some money in his clenched fist at the time of his arrest. The 1st and 2nd appellants elected not to testify under oath to contradict the evidence, led by the state, linking them with the crimes.
- [9] Although Ms. Mbonani could not identify any of the robbers, she testified that, after the shots were fired, she heard the sound of a plastic bag and coins. The Masina brothers testified that when the appellants arrived at Sipho's room they were carrying a plastic bag containing coins.
- [10] There appears to be no reason why the Masina brothers would falsely implicate any of the appellants. Their evidence is circumstantial and does not link the appellants directly to the crime. Furthermore, the contradictions in their testimony, which the trial court found to be immaterial, point away from any conspiracy against the appellants.
- [11] This court is unable to draw any negative inferences on the failure of the state to call police officer Mthuli to testify and failure to lead forensic evidence. There is strong and undisputed evidence on record that links the appellants to the commission of the crime. This evidence is sufficient to establish the guilt of the appellants notwithstanding the fact that Mthuli did not testify and the absence of forensic evidence.

[12] It is trite that the court of appeal will not disturb the factual finding of the trial unless the latter has committed a misdirection¹. Where there has been no misdirection on fact, the presumption is that the trial court's conclusion is correct. The court *a quo* found the Masina brothers to be credible. The credibility and the factual findings were borne out by the evidence on record. The contradictions in the testimony of the Masina brothers were not material.

[13] Under the circumstances, the decision of the trial court to convict the appellants cannot be faulted.


[14] The following order is made:

1. The appeal against conviction is dismissed

PP 
 S.S. MPHAHLELE
 Judge of the High Court

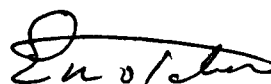
And

I agree


 H.J. FABRICIUS
 Judge of the High Court

AND

I agree


 E. MOLAHELEHI
 Judge of the High Court

¹ *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12d-g.

For the applicant : Adv Augustyn

Instructed by : Legal Aid South Africa

For respondent : Adv Leonard (S C)

Instructed by : The Director of Public Prosecution