



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

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

(3) REVISED.

DATE

16/9/16

SIGNATURE

[Handwritten Signature]

20/9/16

CASE NO: A783/15

In the matter between:

DAVID SELLO MALULEKA

Appellant

and

THE STATE

Respondent

JUDGMENT

MOTHLE J

1. On 21 November 2012 the Appellant was convicted of murder and robbery with aggravating circumstances by the Honourable Madam Justice Kubushi (*"Kubushi J"*) in the High Court, Gauteng Division, Pretoria and sentenced to 18 years for murder and 12 years for robbery with aggravating circumstances. The presiding Judge ordered that the sentences should run concurrently, effectively sentencing Appellant to 18 years' imprisonment.
2. On 1 July 2015 Kubushi J granted leave to appeal against conviction only. The Appellant now comes before the Full Court of this Division on appeal against the conviction.
3. The conviction arises out of an incident which occurred during the night of 12 to 13 November 2009 when an 89-year old pensioner, Frans Adriaan Swemmer, (*"the deceased"*), who was at that time living alone, was attacked and murdered in his home in Monument Park, Pretoria. His body was found the next day. Some of his belongings including a Mercedes Benz motor vehicle were missing.

4. On the morning of the 13 November, the police arrested Mothiba who was found near the stolen motor vehicle in Hammanskraal, in the City of Tshwane. Mothiba implicated the Appellant and took the police to the house of the Appellant where he was also arrested.
5. Mothiba pleaded guilty and after separation of the trials, he was convicted and sentenced. He then turned to testify against the Appellant on behalf of the State, implicating him in the commission of both offences.
6. There were two mutually exclusive versions presented by Mothiba on the one hand and Appellant on the other. Mothiba's version, which was accepted by the Court, is basically that Appellant and another person accompanied him to the home of the deceased where the deceased was robbed and murdered. The three of them then drove to Hammanskraal in the vehicle of the deceased with Appellant being the driver. They then arrived at the home of Appellant and left some of the items they stole from the home of deceased, which they placed in the garage and the house.

7. The Appellant was also given the cell phone of the deceased which he sold or pawned to his girlfriend for R100, money which was used to put petrol in the vehicle and also buy beers.
8. Appellant's version on the other hand is that he first met Mothiba at the Hammanskraal taxi rank. Thereafter one evening (which was the Thursday on the day of the robbery at Monument Park), he saw Mothiba at a tavern in Hammanskraal. He then agreed to a request by Mothiba to take him to his home in order to store some items for him, including a cell phone which Mothiba produced from his pocket.
9. The Court *a quo* accepted Mothiba's evidence in that it was corroborated by other witnesses called by the State. This corroborative evidence included the police having found articles stolen from the home of the deceased, at the parental home of the Appellant; Blood stained clothes in the Appellant's bedroom and Appellant's finger print found on the rear view mirror of the stolen vehicle. The family of the Appellant's girlfriend and the deceased's friend also testified regarding the stolen articles.

10. The trial court found that Appellant's version could not be reasonably possibly true for the following reasons:
 - 10.1 He was evasive under cross-examination and failed to answer some questions. This is born out by the transcribed trial record presented to the Appeal Court;
 - 10.2 He built his story as he went along and most of the answers were not put to the state witnesses, especially to Mothiba;
 - 10.3 He adapted his version as he went along;
 - 10.4 His version was improbable in several other respects including that:
 - 10.4.1 The Court could not find any reasonable motive for Mothiba to implicate Appellant;
 - 10.4.2 The blood stained clothing of the deceased was found in Appellant's bedroom;
 - 10.4.3 The reason he supplied for pawning the cell phone to his girlfriend;

10.4.4 The version that Mothiba travelled to Hammanskraal with the hope to find Appellant whom, according to Appellant, he had only met once at a taxi rank;

10.4.5 He could not provide any reason why Mothiba would leave the clothing of the deceased at Appellant's home and the contradictory and unsatisfactory explanation as to how Appellant's finger print was found on the rear view mirror of the stolen vehicle.

11. In analysing the evidence, the trial Court found that Mothiba's evidence had to be viewed with caution and circumspection because he was an accomplice as well as a single witness in regard to Appellant's role in the murder and robbery. The Court further acknowledged the fact that a risk of implicating an innocent accused is reduced by corroborative evidence from elsewhere in the State's case. Further, the trial Court analysed and accepted the demerits in Mothiba's evidence and concluded, after observing his demeanour, improbability of his version and contradictions inherent in his evidence, that his version could not be reasonably possibly true.

12. In this regard, this Appeal Court accepts that what weighs heavily against Appellant is the finding by the trial Court regarding his credibility as a witness. Having regard to the trial record, this Appeal Court is unable to find anything that would

indicate otherwise in regard to the Appellant's credibility and demeanour on the witness box as different from that found by the trial Court. In this regard we refer to the matter of ***R v Dhlumayo and Another 1948 (2) SA 677 (A)***, which basically cautions an Appeal Court to be very reluctant to upset the findings of the trial judge, as the trial court *"has advantages- which the appellate court cannot have- in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked."*

13. Having regard to the totality of the evidence as presented in the record of the trial Court, this Appeal Court is of the view that Mothiba's evidence, corroborated by other State witnesses and circumstantial evidence presented through these witnesses, enabled the State to prove its case beyond reasonable doubt. On the other hand, Appellant's version, having regard to the improbabilities inherent therein, cannot be accepted as reasonably possibly true. In this regard, it does not pass the test laid out in ***State v Shackel 2001 (4) SA 1 (SCA)*** in regard to the incidence of the burden of proof for both the State and the accused in a criminal trial.

14. This Appeal Court is therefore unable to find any reason to interfere with the conviction by the trial Court and consequently the appeal cannot succeed.

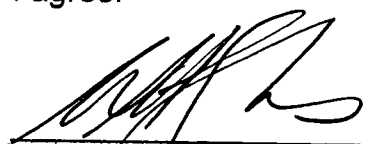
15. In the premises I make the following order:

1. The Appeal is dismissed;
2. The conviction of the trial Court is confirmed.



S P MOTHLE
Judge of the High Court
Gauteng Division
PRETORIA.

I agree:



W HUGHES
Judge of the High Court
Gauteng Division
PRETORIA.

I agree:



M TWALA
Acting Judge of the High Court
Gauteng Division
PRETORIA.

For the Appellant:

Ms M M P Masete

Instructed by:

**Pretoria Justice Centre
Church Square
PRETORIA**

For the State:

Adv. E Leonard SC

Instructed by:

**The Director of Public Prosecutions
PRETORIA**