

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



21/9/16

CASE NO: A 421/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
 (2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
 (3) REVISED

21.9.2016

DATE

SIGNATURE

In the matter between:

LINDIWE MNGOMEZULU
 LUCKY MNGOMEZULU
 THEMBA MAGAGULA

First Appellant
 Second Appellant
 Third Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The appellants were convicted in the Tonga regional court on a charge of murder, two counts of kidnapping and two counts of assault with the intent to do grievous bodily harm.
- [2] The appellants were sentenced to an effective period of 20 years imprisonment.
- [3] Although leave to appeal was granted in respect of both conviction and sentence, the appellants did not persist with the appeal against sentence.

CONVICTION

- [4] The facts pertaining to the events that led to the conviction of the three appellants are largely common cause.
- [5] The first appellant had a break in and theft of certain items at her house. She was desperate to locate the culprits and on 21 February 2011. It came to her attention that one of the culprits was socialising at a tavern in Driekoppies.
- [6] Instead of alerting the police of the information she received, she rounded up a bunch of boys, including members of the community policing forum to accost the suspected thieves. She drove with the second appellant in a double cap bakkie to the tavern. It was approximately 20:30 in the evening.
- [7] Present at the tavern was Nkululeko Shabangu ("the deceased"), Vusimuzi Lewis Shabangu ("Shabangu") and Jabulani Khoza ("Khoza").
- [8] Whilst seated at the tavern they were accosted by a group of boys. According to the evidence of Shabangu, the deceased was hit with a bottle on his head and thereafter both the deceased and Khoza succeeded in escaping by jumping over a fence wall.

[9] Shabangu could not escape and was thrown to the ground. Whilst lying on the ground he was assaulted with a knobkerrie and kicked. Fortunately, the owner of the tavern came to his rescue and locked him in the tavern in order to save him from his attackers. He could only recognise the first appellant as being amongst the group that were attacking him. He testified that the first appellant was merely a spectator and that she did not participate in the assault. As will appear *infra*, his version on this aspect differs from the evidence of Khoza.

[10] Khoza testified that he was with the deceased and Shabangu when the first and second appellants arrived at the tavern armed with knobkierries. Whilst they were still seated the first and second appellants started throwing knobkierries at them. The two appellants were in the company of approximately 15 other people.

[11] Khoza, shortly thereafter, changed his version and testified that the second and third appellants threw the knobkierries at them, whilst the first appellant was in possession of a sjambok. He jumped over the fence wall, but was caught by the group and taken to a bakkie. The second appellant was the driver of the bakkie. After a while the deceased was also brought to the bakkie.

[12] Save for denying their involvement in the assaults and stating that they remained behind in the bakkie, the aforesaid evidence was not disputed by the first and second appellants.

[13] According to Khoza, the first appellant was the one giving instructions and she told the second appellant to drive to her house in Gumslusha.

[14] The first and second appellants confirmed that they took the deceased and Khoza to the first appellant's house, but deny any further involvement thereafter. According to them the group of people left with the deceased and Khoza and they only learned the next day of the tragic events that unfolded during the night.

- [15] According to Khoza, the first appellant instructed a certain male person to get more knobkierries from her garage. Khoza and the deceased were ordered to walk to Nyati dam and whilst walking they were assaulted. They were assaulted by the second and third appellants and a group of people. Although the first appellant initially only ordered the group to assault them, she also participated in the assault at a later stage.
- [16] Upon their arrival at Nyati dam they were made to lie on the ground and were further assaulted. At this stage the first appellant assaulted them with a sambok. Thereafter they were carried to a place next to Patel Hardware and the second appellant was ordered to fetch a vehicle. The second appellant arrived in a green Toyota Corolla and both the deceased and Shabangu were thrown into the boot of the vehicle.
- [17] Whilst on their way to Mzinti trust, Khoza managed to jump out of the boot of the vehicle and took refuge under a tree. He heard the vehicle stop. It was a distance of approximately 100 metres from him and although he could not see what was happening, he could hear people talking.
- [18] He was not sure if the first appellant was present, but he could recognise the voices of the second and third appellants. The deceased's body was dropped and the vehicle drove away. Khoza was rescued by the driver of a tractor and he directed the driver to the place where the deceased's body was dumped. The police was called to the scene.
- [19] Khoza knew the first and second appellants well, but saw the third appellant for the first time on the day of the incident. Although he saw the third appellant for the first time on the day of the incident, he described the third appellant to the police and directed them to Langloop where the third appellant was apparently residing.

[20] During cross-examination, some discrepancies between his evidence and the version contained in a statement made by him directly after his ordeal were pointed out to him. Khoza answered that he was still traumatised by the vicious assault and might have made mistakes on certain aspects.

[21] The appellants listed several contradictions between the evidence of the two state witnesses and the discrepancies between their *viva voce* evidence and the version contained in their statements. The appellants, quite correctly, pointed out that the court *a quo* did not deal with these contradictions and discrepancies in its judgment.

[22] The question, however, remains whether the court *a quo* erred in accepting their evidence. Having regard to the prevailing circumstances during the commissioning of the crime, I am of the view that the contradictions and discrepancies are to be expected. One should also bear in mind that the two state witnesses perceived the unfolding events from the vantage point of their own situation at the time. The fact that Khoza's statement was taken directly after he was viciously assaulted, also explains the discrepancies.

[23] Both state witnesses did not exaggerate the participation of the first appellant. Shabangu testified that she did not participate in the assault in the Tavern. Khoza only implicated her in the assault at the dam. Khoza candidly stated that he does not know whether the first appellant was on the scene when the deceased's body was dumped. The evidence of Shabangu and Khoza as a whole has a ring of truth and the court *a quo* correctly relied on their evidence.

[24] On the first and second appellants' own version, they were part of the group that forcefully took the deceased and Khoza from the tavern. Their version that they were mere innocent bystanders and did not actively participate in the assault of the deceased and Khoza is highly improbable. Why would a group of people out of their own volition assault two alleged perpetrators who did nothing to them? It is indeed only the first appellant who had any interest in the assault of the two suspected perpetrators. Her goods were stolen and she wanted the goods back. When she proceeded to the tavern with the second appellant, the

intention was clear, to get her goods back at all costs and to punish the suspected thieves for the injustice that was done to her.

[25] Save for the evidence of the state witnesses, the state also relied on warning statements made by the three appellants. The statements of the first and second appellants accord with their evidence in court. The fact that the first and second appellants all along denied any involvement in the commissioning of the crimes is taken into account, but does not assist them in evaluating the totality of the evidence presented by the State.

[26] The statements of the first and second appellants implicated the third appellant in the commissioning of the crimes. I agree with Mr R Kriel, counsel for the appellants, that this evidence ought not to be used against the third appellant.

[27] The third appellant, however, also made a warning statement. The state proved that the statement was obtained voluntarily and the statement was admitted into evidence. The third appellant denied that he made the statement. The evidence of the police officer who obtained the statement, constable Maphosa, was reliable in all material respects and the court *a quo* correctly relied on the contents of the statement.

[28] The only relevance of the statement is the fact that the third appellant placed himself at the scene of the crime. This admission corroborate the evidence of Khoza that the third appellant was at all relevant times one of the perpetrators of the crime.

[29] The third appellant relied on an alibi and testified he was living with his wife, Faith Nkosi, in Matsulu at the time. His wife testified and confirmed his version. This evidence is in direct contradiction to the version contained in his warning statement and is rejected as being false.

[30] Insofar as the different charges are concerned, the State relied on the doctrine of common purpose in order to proof its case.

[31] Having regard to the evidence in its totality, I am satisfied that the State did prove its case beyond reasonable doubt. Consequently, the court *a quo* correctly convicted the appellants on all the charges. And the appeal against conviction must fail.

ORDER

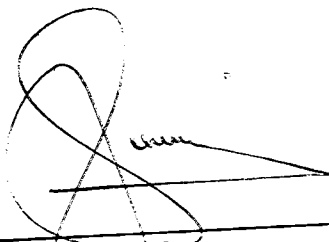
In the premises, I suggest the following order:

The appeal against conviction is dismissed.



JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



SETHOLE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Appellant	:	Advocate R Kriel
Instructed by	:	Mr Lucky Mngomezulu
Counsel for the state	:	Advocate Kotze
Instructed by	:	The State