IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A60/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

SIGNATURE 03/03/2021 DATE

In the matter between:

RAMALOKO, LEBOGANG	**1ST APPELLANT**
MOTLOKOA, LELEFA	**2nd APPELLANT**
MAIMANE, THABISO	**3rd APPELLANT**

And

THE STATE	**RESPONDENT**

JUDGEMENT

MOSOPA, J

1. The issues in this judgment are;
    1.1. The admissibility of the warning statements by the second and third appellants;
    1.2. Whether the state led sufficient evidence to convict the appellants; and

1.3. The sentence imposed.

2. The three appellants were convicted of housebreaking with intent to rob and robbery with aggravating circumstances, read with the provisions of section 51(2) of Schedule 2 of Act 105 of 1997, murder read with the provisions of section 51 of Act 105 of 1997 and the contravention of section 49(1)(a) of the Immigration Act 13 of 2002.

3. Following their convictions, the appellants were sentenced as follows:
   3.1. Housebreaking with intent to rob and robbery – 15 years imprisonment;
   3.2. Murder – life imprisonment; and
   3.3. Contravention of Immigration Act – 3 years imprisonment.

4. The appellants have a right of automatic appeal by virtue of the fact that life imprisonment was imposed for the murder charge.

5. This is an appeal against both conviction and sentence. The appellants were all legally represented throughout their trial.

Incomplete Record

6. Upon reading the record, it came to our attention that the evidence of Mr Thokozane Ngcobo was missing. Mr Ngcobo was the witness who allegedly bought a cellular device, which was allegedly robbed from the complainants, from the third appellant.

7. The evidence of Mr Ngcobo became apparent when the third appellant was led by his counsel as questions were asked pertaining to Mr Ngcobo. Same was apparent under cross-examination and it appeared that Mr Ngcobo bought the cellular device from the third appellant on 1 June 2016, when the third appellant wanted money for transport for his girlfriend. The same evidence was also dealt with at length by the magistrate in his judgment and it is part of the evidence which was used to convict the third appellant. Also, when officer Ramosinong was testifying, he mentioned the fact that he received a cellular device from Mr

Ngcobo, which he purchased from the third appellant, when he came back from KwaZulu Natal.

8. Neither of the parties raised this issue in their notice of appeal nor in their respective heads of argument. The issue was raised by the court *mero motu* when hearing the appeal matter.

9. In the matter of **S v Chabedi 2005 (1) SACR 415 (SCA)** at para 5-6, Brand JA, when dealing with the issue pertaining to an incomplete record on appeal, observed;

"[5] ...however, the requirement is that the record must be adequate for proper consideration of the appeal, not that it must be a perfect recording of everything that was said at trial...
[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal (See also S v Schoombie and Another 2017 (2) SACR 1 (CC))."

10. What we know from the record, despite the missing evidence is that;
    10.1. The third appellant and Mr Ngcobo were, at that stage, neighbours;
    10.2. Mr Ngcobo bought a cellular device for an amount of R400.00, from the third appellant;
    10.3. The cellular device bought from the third appellant was returned to officer Ramosinong by Mr Ngcobo and kept in the SAP13; and
    10.4. That this was not the only evidence which was used to convict the third appellant.

11. Based on the above, we were satisfied that despite the record being incomplete, it was adequate for proper consideration of the appeal matter, as was decided in the **Chabedi** matter.

Conviction

12. It is trite that where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct and the appeal court will only reverse it where it is convinced that it was wrong (**R v Dhlumayo and Another 1948 (2) SA 677 (A)** at p 706). In my view, this is the correct view that must be adopted by the court of appeal where the presiding trial court misdirected itself when dealing with the merits of a particular case.

13. The evidence used to convict the appellants can be summarized as follows; all the appellants are Lesotho nationals, who are in the country illegally. They failed to produce their passports or permits. All the complainants did not see the people who attacked them. They all confirmed that on the night of the incident, a window was broken and they went outside to investigate what was happening. They went back to the house and they heard a second window breaking. They then ran into different bedrooms and locked themselves in. They heard a person saying that he only wants money, he is not going to hurt them. Then a shot was fired through the bedroom door of the deceased, which eventually killed her. At that stage, the deceased was in the company of her minor child.

14. A bicycle, two cellular devices and a microwave oven were taken from the home by the perpetrators. The microwave oven was found at the hostel when the police attempted to arrest the third appellant, but he evaded arrest. The cellular device was retrieved from Mr Mathika, who bought it from the third appellant for R400.00, and the other cellular device from Mr Ngcobo, who also bought it from the third appellant.

15. The first appellant, after his arrest, while he was in custody for an unrelated matter, did the pointing out and made certain admissions to the officer in charge of the pointing out, which were found to be admissible by the trial court. The second appellant made a warning statement to the investigating officer Nagel, and made certain admissions which the court found to be admissible. The third appellant, in addition to the evidence by people who bought cellular devices from him, made a warning statement to investigating officer Nagel, which was found to

be admissible by the court. Only the second appellant did not testify in his defense. The rest of the appellants denied the allegations against them when they testified.

Evaluation

16. The first appellant was properly and adequately appraised of his constitutional rights before he made the pointing out. These rights were understood by the first appellant, as they were explained to him in the language that he understood best – South Sotho. The undisputed evidence is that Sergeant Chele is a South Sotho-speaking person and further, that there was no misunderstanding when the language was interpreted to the first appellant.

17. The first appellant made certain admissions to the officer in charge of the pointing out after he was again appraised of his constitutional rights. He did not admit to the commission of the offence, but admitted that he was there at the scene and informed the captain of his role on the night of the incident. The below court, in our considered view, did not misdirect itself when it found the evidence of the pointing out to be admissible. As such the accused was correctly convicted of the offence he was charged with. We see no reason to interfere with such conviction.

18. The second appellant was convicted solely on the warning statement. The second appellant was not assaulted or coerced into making the warning statement, he was promptly and adequately appraised of his constitutional rights and he understood such rights.

19. In the warning statement, the second appellant was afforded an opportunity to make an election pertaining to the right to legal representation. The second appellant elected to be represented by a legal practitioner at the state's expense. The steps taken by the investigating officer to provide him with the opportunity to do so, reveals the following: *"He will apply at court for legal aid."*. Simply put, it means that no steps were taken to provide the second appellant with legal representation during the taking of the warning statement, despite him making such an election.

20. When asked whether he was willing to make a statement in relation to the allegations against him, he elected not to make a statement. The investigating officer proceeded to ask him questions, despite the second appellant's election to have a lawyer present and to not answer questions, and he then made certain admissions. The below court consequently convicted the second appellant based on the admissions made.

21. The same can be said about the third appellant in relation to the warning statement he made to the investigating officer. He also wanted to have a lawyer present and even informed the investigating officer that his brother was on his way with a lawyer. However, questions were asked and the third appellant made certain admissions, even though he elected not to answer questions.

22. The court below, in admitting the warning statement of the second appellant, stated that, *"...the answers and questions were exculpatory. He did not incriminate himself. Accused 2 (second appellant) also admitted that he had heard shots (referring to gunshots). The court asked the defense whether the admissibility of the warning statement was disputed. It was not disputed, as the state pointed out. It was admitted, but the defense, however, indicated that they will ask questions in cross-examination of the witness in respect of the statement."*

23. An admission must, in order to be admissible, meet at least three requirements;

    (i) It must be constitutionally compliant (i.e., the accused must be informed of his constitutional rights – to remain silent, to legal assistance before deciding to make a statement);
    (ii) It must be relevant; and
    (iii) It must be voluntarily made within the dictates of section 219A and comply fully with the other requirements of that section. (**See Commentary on the Criminal Procedure Act, Du Toit et al, at 24-76A**).

24. The issue of the voluntariness of the answers and admission made is not relevant here, as it was conceded on behalf of the appellants that they were not threatened or assaulted and thus, voluntarily answered the questions.

25. In the matter of **S v Manamela and Others 2000 (3) SA 1 (CC)** at para 35, the Constitutional Court, observed the following, with regard to the right to silence:

> *"[35] ... This Court has said that "[t]he right to silence, like the presumption of innocence, is firmly rooted in both our common law and statute" and is "inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at his or her trial"."*

26. The right to remain silent has different applications at different stages of criminal prosecution (See **S v Boesak 2001 (1) SA 912 (CC)**). When a person is arrested, the right to remain silent applies and a person cannot be compelled to make a confession or admission that may be used against them later at trial (**S v Thebus 2003 (6) SA 505**). In our constitutional setting, pre-trial silence of an accused person can never warrant the drawing of an inference of guilt.

27. The issue now is when the warning statement of the second and third appellants were obtained, whether they were obtained in violation of the appellants' rights, namely the right to have a legal representative present and the right to remain silent or not to answer questions; and whether the admissibility thereof rendered the trial of the second and third appellants unfair.

28. Paragraph 3(a) of the warning statement, which was not placed in dispute during trial, indicates that both the second and third appellants were warned of *"...their right to remain silent throughout the interviews and are not compelled to make any statement or to answer any questions. Any statement that they make and anything they say, will be written down and may be used as evidence in a court of law. Should they prefer to make a statement or to answer questions, such a statement or answers will be admitted to the prosecutor..." (sic).*

29. It must further be noted that the second and third appellants did not make any allegations of torture, threat or assault when the warning statements were taken and the "question and answer" which followed, was made voluntarily by the appellants, despite being warned of their right to remain silent and not to answer questions.

30. Now what must be determined is whether the statement made under circumstances set out in paragraph 29 above, is admissible and whether it is a violation of the appellants' constitutional rights. In the matter of **S v Marx and Another 1996 (2) SACR 140 (W)** at 148D-F, Cameron J (as he then was), observed the following, in this respect;

> *"...it seems to me to be sufficient if the accused or the suspect is informed of his right and chooses, knowing of it, to proceed to make the statement or the pointing out in question..."*

31. The second and third appellants were fully aware of their constitutional rights, as it was explained to them and it is then my considered view that, knowing of their rights, the appellants should have refused to answer the questions asked by the investigating officer, because at that stage they knew that they were not compelled to answer questions. I am therefore of the view that the warning statements by the second and third appellants were appropriately admitted as evidence, considering that they were exculpatory in nature, as was correctly found by the court below.

Sufficiency of Proof

32. It is trite that the onus to prove the guilt of the appellant rests with the respondent (**S v Van der Meyden 1999 (2) SA 79 (W)**). As already indicated, there was no evidence in respect of the identity of the appellants led.

33. The first appellant voluntarily made the pointing out of the scene and made certain admissions about the role he played on the night of the incident. The

second appellant, in his warning statement, admitted to being present at the scene, but denied that he committed any offence. The fact that he voluntarily travelled with the first and third appellants to the scene and remained there until the shots were fired and items taken from the premises, makes him liable for the offence he is charged with. The fact that the second appellant evaded his arrest, by running away when the police wanted to arrest him on the first occasion, suggests that he knew something about the offence. The second appellant also made certain admissions to the investigating officer, in respect of the offences, which also makes him liable for the offences proffered against him.

34. The third appellant made certain admissions of being present at the scene, in his warning statement. Apart from the statement he made, there is evidence that he sold cellular devices, which were stolen from the murder scene, to two people. The first cellular device was sold a day after the incident, at 9h00, whereas the incident occurred at 23h45 the previous night. I am satisfied that the cellular device was recently stolen, when it was sold the following day.

35. In the matter of **Mothwa v the State (124/15) [2015] ZASCA 143** at para 8, the court, in respect of the doctrine of recent possession, observed;

> *"The doctrine of recent possession permits the court to make the inference that the possession of the property was obtained in the commission of the offence and in certain instances, was also a party to the initial offence. The court must satisfy itself that (a) the accused was found in possession of the property, (b) the item was recently stolen..."*

36. The second cellular device was sold a few days later by the third appellant, to his neighbour, Mr Ngcobo. No specific reason was offered as to why the two witnesses who purchase the cellular devices from the third appellant would lie about him.

37. In addition, upon his arrest, the third appellant spontaneously informed the police that he knows the reason for their presence and that he is wanted for the murder case. The police could not have warned him of his constitutional rights, because

this admission was made immediately after the door of the house he was hiding in from the police, was opened by the police. The third appellant, without improper influence, voluntarily and spontaneously made such admissions. (see **S v Khan 1997 (2) SACR 611 (SCA)**).

38. The state discharged its onus in proving the guilt of the appellants in all counts and there is no need for this court to interfere with the decision of the court below.

Sentence

39. In **S v Bogaards 2013 (1) SACR 1 (CC)** at para 41, the Constitutional Court, when dealing with the appellate court's power in respect of appeals on sentence, observed;

> *"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by the court below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, the court below misdirected itself to such an extent that its decision on sentence is vitiated or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."*

40. The appellants were sentenced to three years imprisonment for contravention of the Immigration Act 13 of 2000. Section 49(1)(a) provides that a person will be liable, on conviction, to a fine or to imprisonment not exceeding two years. The appellants in casu were sentenced to three years imprisonment, and this sentence thus exceeds the sentencing jurisdiction in terms of the Act. The court below misdirected itself and thus, there is a need to interfere with the sentence imposed on this count.

41. Count 1 provides for a minimum sentence of not less than 15 years imprisonment for a first offender. The appellant can only escape this sentencing regime if he can show the existence of compelling and substantial circumstances in terms of

Act 105 of 1997. Count 2 provides for a minimum sentence of life imprisonment for an offender convicted under the circumstances set out under section 51(1) of Act 105 of 1997. The appellant in this subsection, can escape the prescribed sentence if he can show the existence of substantial and compelling circumstance. The court below did not find such substantial and compelling circumstances and sentenced the appellants according to the prescribed sentences.

42. In the seminal judgment of **S v Malgas 2001 (2) SA 1222 (SCA)**, the court observed that the minimum sentence, as dictated by the legislature, is a point of departure. However, a court may depart from the prescribed sentence where it is not appropriate in light of the circumstances of the crime committed in a particular matter.

43. The deceased in count 2 was shot and killed, in the course of the commission of a robbery, which thus makes the offence in count 2 fall squarely within the ambit of section 51(1) of Act 105 of 1997. The deceased was killed in a place she thought safe. After the appellants gained entry by breaking the window, a bullet was shot through the door, which eventually killed the deceased. The deceased was not alone in her bedroom, at that time – she was with her minor child. Fortunately, the child was asleep at that stage. The door to the deceased's bedroom was locked and the police had to break it down to gain entry to the bedroom. Obviously, the child saw the body of its mother.

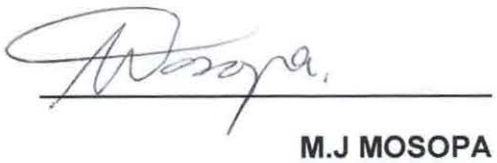
44. The deceased was killed in a callous and cold-blooded manner. Her right to life was taken away by the appellants. She did not die a dignified death at the hands of the appellants and as such, her right to dignity was also taken away by the appellants.

45. One of the cellular devices stolen was meant for the education of one of the complainants, as it was issued by the Department of Education. The cellular device was sold for a meagre amount. Fortunately, most of the stolen items were recovered when the appellants were arrested, but the bicycle remains missing.

46. We are of the view that there is no need to interfere with the sentence of the below court in this regard, as we see no misdirection.

47. In the consequence, the following order is made;

1. The appeal against conviction is dismissed.
2. Appeal against count 1 and 2 is dismissed.
3. Appeal against count 3 is upheld and substituted, the sentence to be served by the accused is as follows;
   3.1. Count 1: fifteen (15) years imprisonment;
   3.2. Count 2: life imprisonment;
   3.3. Count 3: two (2) years imprisonment.

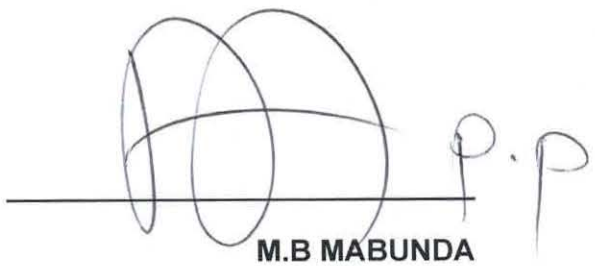


M.J MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

I agree,



M.B MABUNDA

ACTING JUDGE OF THE

HIGH COURT, PRETORIA

APPEARANCES

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For Respondent:	Adv A van Vuuren
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