



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A 476/10

In the matter between:

LUCKY MTHEMBU

First Appellant / Accused 2

MNINAWA PHELA

Second Appellant / Accused 3

PHUMELE RINKIE VAAIBOOM

Third Appellant / Accused 4

CHUMANI SIBANDA

Fourth Appellant / Accused 5

and

THE STATE

Respondent

JUDGMENT ON APPEAL: 18 FEBRUARY 2011

GOLIATH, J:

[1] The appellants were convicted on 5 May 2010 by **Motala, J** on two counts of murder, two counts of robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition. They were sentenced to twenty five (25) years imprisonment on each count of murder, twelve (12) years on each count of

robbery with aggravating circumstances and three (3) years imprisonment for the unlawful possession of a firearm and ammunition, which were taken together for the purposes of sentencing. All sentences were ordered to run concurrently. With the leave of the court *a quo* appellants now appeal against their conviction.

[2] On 12 July 2006 at 18:47 the South African Police emergency 10111 centre was contacted by a person named Simphiwe who lodged a complaint of drunkenness and assault at 12 Sigcawu Street, Langa. The complaint was registered and transmitted to the late constable PZM Golimpi who responded. The centre received a negative feedback and no docket was opened. On 19 July 2006 at 19:51 a person named Jack contacted the centre with an assault complaint at the same address. Once again officer Golimpi responded to the complaint accompanied by a colleague. This complaint also turned out to be false. However, after enquiring about the complaint at 12 Sigcawu Street, the two officers were ambushed and murdered whilst sitting in their vehicle in front of 12 Sigcawu Street.

[3] Two young girls, Nolundi Dalindyabo (15 years at the time) and Nwabisa Mahlanyana (born 28 October 1991), witnessed the incident. They were standing on the corner of Sigcawu and Rose-Innes Streets with a group of friends. Both testified that a police vehicle approached them and asked for directions to a particular address in Sigcawu Street. The police went to the house. Mahlanyana testified that she suddenly saw a silver grey Toyota Cressida at the scene. The Cressida stopped at the garage of a house and four males alighted from the vehicle, which subsequently drove off.

[4] Dalindyebo testified that she saw three males, standing next to the garage moving in the direction of the police van with a fourth person. Both of them heard shots being fired. Both saw persons leaning into the police vehicle searching the contents. Both testified that there were two persons on either side of the vehicle. Dalindyebo testified that both doors of the van were open and she saw at least two persons with guns. Shortly after the shots were fired both saw the police van moving in the direction of a yard. According to Mahlanyana the driver of the van lost control and drove into the yard. Both the girls eventually ran away from the scene. Mahlanyana identified one of the perpetrators as Rinkie.

[5] Nobesuthu Mtlemeza lives at 12 Sigcawu Street and responded to the police when they came to enquire about a complaint. She testified that she recognized one of the police officers as the same person who attended to a similar false complaint the previous week. She testified that the deceased were uneasy about the false complaint and were suspicious about a group of persons in the vicinity. Shortly after the police left her house she heard a loud noise. She went to enquire what had transpired and went to look at the car. She established that the police van had crashed into Humphrey's yard. She identified the police officers as the ones she spoke to earlier.

[6] Mr Mark Butsaka lives on the corner of Merriman and Sigcawu Streets. He testified that he was watching television on 19 July 2006 when he was distracted by a loud noise in his yard. He went to investigate and saw a white police vehicle had crashed into his yard. On further investigation he saw two police officers inside the vehicle. He immediately went to the police office to report the incident.

[7] Captain Lourens attended to Butsaka's complaint and accompanied him to his residence at 16 Merriman Street. There he made the grisly discovery that the two police officers had been shot.

[8] Superintendent Temmers who was the branch commander at Langa Police Station at the time was allocated the case. He proceeded to dispatch a team to assist him with the investigation. They obtained witness statements, information from police intelligence through their informer network as well as information about a Toyota Cressida. Temmers testified that immediate efforts were made to trace Rinkie who was named by a witness, but were initially unsuccessful. Information about the Toyota Cressida was followed up and culminated in the arrest of Bulelani Joseph Vellem. He testified that fourth appellant eventually handed himself over at the Bellville Police station on 18 September 2006.

[9] Inspector Louw was involved in the arrest of Vellem and first appellant on 26 July 2006. During Vellem's arrest he seized his sim card. He asked Vellem for his cell phone and as a result of information he received from Vellem, he subsequently took possession of a cell phone from a woman in Phillippi where Vellem had taken him.

[10] After he arrested Vellem he went with Vellem to the residence of first appellant. Louw further testified that he confiscated four cell phones at the home of first appellant, who acknowledged ownership thereof. Thereafter Louw went to NY55 number 12, an address given to him by Vellem as the address of second appellant, where he seized a cell phone in the absence of second appellant.

[11] On 2 August 2006 police officers Sergeant Phambela and Inspector Mclean amongst others, arrested second appellant. Prior to his arrest the second appellant was shot by Phambela whilst running away. On 16 August 2006 third appellant was eventually arrested by Constable Gungqisa.

[12] Bulelani Joseph Vellem who was initially a co-accused testified, after he was duly warned in terms of section 204 of the Criminal Procedure Act. At the time of the incident he was employed as the driver of a Toyota Cressida Taxi. He testified that on 19 July 2006 he received a phone call from fourth appellant who requested him to come to Rinkie's house. He picked up the four appellants at Rinkie's place and dropped them off at a taxi rank in Langa.

[13] Third appellant later phoned him and asked him to come to NY69 Gugulethu. He obliged because he wanted to be paid for the taxi service he rendered. On his arrival he saw them playing with guns. He enquired from them where they had obtained the guns and third appellant advised him that same was obtained in Langa by shooting the police. The next morning he went back to NY69 for his money, but found no one at home. He was arrested on 26 July 2006. A Vodacom sim card was taken from him. The police requested his cell phone and he subsequently took the police to the lady to whom he had sold it. He positively identified a Nokia 1100 as his phone.

[14] The evidence was led of Inspector Treurnicht on the operation and recording of phone calls to the South African Police emergency 10111 line. It was established that the system records the data of all incoming calls. Superintendent Viljoen expounded on the analysis of the calls. He testified that on 12 July 2006 three calls were made to the

10111 number from the vicinity where the deceased were murdered. Similarly, 19 July 2006, four calls were received from the same area. On further analysis it was established that the handset of second appellant was used to phone 10111 on 12 July 2006 and that this particular phone was in the vicinity of the murders on both 12 and 19 July 2006. He testified further that the telephone number of first appellant was reflected on the incoming line at the 10111 centre as 19 July 2006. The analysis clearly established contact between first appellant and second appellant since the former received calls from the latter. Vellem's phone was in the same sector on 19 July 2006. He confirmed that Vellem phoned third appellant, Rinkie Vaaiboom on this particular day. Third appellant in turn contacted Vellem telephonically four times on 19 July 2006. Ms Heneke, the Forensic Liaison Manager at Vodacom corroborated Viljoen's evidence of contact between the telephones of Vellem and third appellant. Ms Du Plessis, a forensic data analyst at MTN, also confirmed Viljoen's evidence of contact between the telephones of first and second appellant.

[15] All the accused testified in their defence and all of them denied involvement in the crime. First appellant admitted that his phone was used in Langa on 19 July 2006, but denies that he was the caller. He suggested that one of his friends could have used it when he was playing soccer. He denied being in the vicinity of the crime on 19 July 2006.

[16] Second appellant testified that he was at work on 19 July 2006. He admits that he fled the scene and was shot by Inspector Phambela on 3 August 2004. According to him the police was not identifiable to him when he fled. He confirmed Phambela's evidence that the police returned to the area to arrest him later the evening. He stated

that he did not know Vellem or accused no 2. He admitted ownership of a Samsung phone. However, he did not have his cell phone in his possession on 12 July 2006 and was not sure whether it was in someone else's possession on 19 July 2006. He therefore denied calling the 10111 emergency number. He was certain that he was not in Langa on 19 July 2006. His witness, Ayanda Jacobs, could not elaborate much on his whereabouts on 19 July 2006 but confirmed that he was always at work.

[17] Third appellant was a student at the time of the incident. According to him he did not own a cell phone on 12 July 2006 and had no knowledge of the call to the 10111 call centre on this day. He testified that he did not know Vellem and denied being in Sigcawu Street on 19 July 2006. He was aware that the police were looking for him on 19 July 2006. He decided not to return home after school on 20 July 2006. His mother confirmed that the police enquired about his whereabouts. He was eventually arrested on 15 August 2006. He strongly rejected Vellem's version of events.

[18] Fourth appellant testified that he was at school on 19 July 2006 and attended soccer training. He denied having been in Langa at all on 19 July 2006. He also denied that he knew Vellem or ever made telephonic contact with him. According to him he never owned a cell phone and he therefore denied contacting the 10111 centre on 12 July 2006. He also denied that he phoned Vellem on 19 July 2006. His soccer coach Mogamat Kamaldien could not remember if he was at a training session on 12 July or 19 July 2006. Kamaldien testified that fourth appellant was usually contacted by him on a landline and cell phone.

[19] Fourth appellant's father, Ntsikelelo Sibanda, confirmed that the police came

looking for him at the end of July 2006. However, the accused left school and slept elsewhere whilst funds were being raised to instruct an attorney. Sibanda could not elaborate on his son's whereabouts on 19 July 2006.

[20] With regard to the conviction, counsel on behalf of appellants, **Adv Mahlasela** and **Adv Kloppers**, argued that the learned judge erred in accepting the evidence of Vellem, disregarding the discrepancies in the evidence of Ms Mahlanyana and Ms Dalindyabo and finding that the State proved its case beyond reasonable doubt. **Adv Sebelebele** on behalf of the State argued that the conviction was in order and that the appeal should be dismissed.

[21] A court of appeal will not lightly interfere with the findings of fact of the trial court unless there are demonstrable and material misdirections. The findings of fact of the trial court are presumed to be correct and will only be disregarded if the recorded evidence shows them to be wrong. (See **Koopman v S**, [2005] 1 All SA 539 (SCA); **S v Hadebe & Others**, 1997 (2) SACR 641 (SCA) at 645f.)

[22] I am of the view that the learned judge carefully analysed the evidence of the State witnesses and was mindful of the fact that Vellem's evidence should be viewed with caution. He found the evidence of the State witnesses to be credible and reliable. He rejected the version of the appellants as untruthful and improbable.

[23] The learned judge enjoyed the considerable advantage of having seen the

various witnesses in the witness box and was in a far better position than this court to assess their credibility and reliability. All the witnesses gave a logical and coherent explanation of the sequence of events which gave rise to the death of the deceased. The judge correctly found that the contradictions in the evidence of Nwabisa Mahlanyana and Nolundi Dalindyabo were non material in nature. (See **S v Mkhohle**, 1990 (1) SACR 95 (A) at 98f-g.) He also found Vellem's evidence to be credible, reliable and satisfactory.

[24] The court adopted a holistic approach to the evidence. The mosaic of evidence is as follows: A suspect is identified in the early hours of the morning after the commission of the offence, and a Toyota Cressida identified by a State witness is traced. Subsequently an accomplice is arrested who implicates the appellants. Both second and third appellant tried to evade arrest. The cell phone evidence further completes the mosaic in that it corroborates the version of the accomplice and strengthens the identification of the appellants as the perpetrators. It was clearly established that two of the appellants lodged false complaints at the 10111 call centre to lure the deceased to the area. Contact was maintained between those involved, particularly prior to the execution of the crime. A conspectus of the evidence points incontrovertibly in one direction and that is that the evidence of the appellant is without a doubt false.

[25] I am not persuaded that the learned judge committed a misdirection in his approach when assessing the evidence. The evidence clearly establishes that appellants executed a brutal and unprovoked attack on the deceased. I am not convinced that there is any basis on which to interfere with the findings of the court a

quo. It is clear that the State has indeed proved the guilt of the appellants beyond a reasonable doubt. The appeal on conviction ought to be dismissed.

[26] In the circumstances the following order is made:

The appeal against conviction is dismissed.



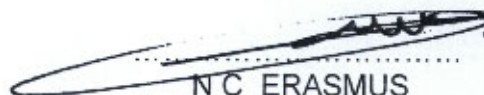
PL GOLIATH

SAMELA, J: I agree.



MT SAMELA

ERASMUS, J: I agree and it is so ordered.



NC ERASMUS