IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A618/2009

DATE: 18 FEBRUARY 2011

In the matter between:

MASHAVA GAQA 1st Appellant

PHATHUXOLO MADYAKA 2nd Appellant

TOBELA MBANDAZAYO 3rd Appellant

NCEDO MBANDAZAYO 4th Appellant

and

THE STATE

J U D G M E N T

KATZ, AJ:

In this appeal the four appellants, all adult males, were arraigned in the Regional Court at Wynberg on one count of murder read with the provisions of section 51 of the Criminal Procedure Act 105 of 1997. Despite pleas of not guilty, they were all subsequently convicted as charged and after the court found that there were substantial and compelling

circumstances, were each sentenced to 18 years imprisonment on 21 April 2009.

The appellants were legally represented during the trial. On 25 June 2009, the appellants applied for condonation for leave to appeal to this court against conviction and sentence and the court *a quo* granted both applications on the same day. The four appellants now approach this court in appeals against both their convictions and the sentence of 18 years imprisonment. In this court, Mr Klopper appeared on behalf of the first, third and fourth appellants and Mr Mia appeared on behalf of the second appellant, while Mr Vakele appeared on behalf of the state.

In their heads of argument, both Mr Klopper and Mr Mia focused on a difficulty with the conviction which was what they submitted was the identification of the four accused. The court *a quo* convicted the appellants on the basis of a single witness, being Sophia Barends. She testified that she saw the four appellants. She testified that she knew the four accused and she saw them shortly after the attack which resulted in the death of the deceased. Both Mr Klopper and Mr Mia attacked the veracity of her identification and submitted that the court *a quo* erred and misdirected itself in believing Sophia Barends' identification of the four appellants.

Thus the second appellant, for example, relies on various judgments in this jurisdiction and others to suggest that the court *a quo* was incorrect in coming to the conclusion that Sophia Barends' identification of the appellant was sustainable. However, what struck me in reading the record, was that even if Sophia Barends' identification of the four appellants was correct, a difficulty nevertheless arose for the state. The state has a duty to prove its case beyond a reasonable doubt and even if Sophia Barends saw the four appellants on the night in question, at the time she said that she did, that did not mean that the only reasonable possible inference that could be drawn was that the four appellants were involved in the fatal attack of the deceased.

Indeed, during the court *a quo*'s judgment, the court *a quo* stated:

> "The more relevant question is, therefore, not how much impressed the court was with Ms Barends and the other state witnesses, but whether it is possible that the three or four accused were not involved in this fatal attack."

Mr Vakele accepted, and agreed with Mr Klopper and Mr Mia that the court *a quo*, in stating that to be the test, applied the

wrong test as criminal law in this country has developed. It is not for the court to determine whether it is possible that the accused were not involved in the fatal attack, but rather whether the only reasonable inference that can be drawn is that the appellants were involved in the fatal attack or in the alleged crime. In Mr Vakele's submission, even though the court *a quo* stated the wrong test, nevertheless the circumstantial evidence on record suggested that the only reasonable inference was that the four appellants were involved in the attack.

When asked what the circumstantial evidence was, he was driven, understandably, to start off by saying that Sophia Barends saw the four appellants immediately after attack. However, when it was pointed out to him, he had to concede that that was not Sophia Barends' evidence. Her evidence was that some time took place after the attack before she saw the four appellants. I mention that just as an example of the difficulties the state has in trying to demonstrate that the circumstantial evidence points to the four appellants being involved in the attack as the only reasonable inference that a court can draw.

In my view the court *a quo*'s obvious irritation and frustration with what it perceived to be "pathetic police investigation", led

it to draw an inference that the four appellants were involved in the fatal attack, when that was not the only reasonable inference that can be drawn on the basis of all the evidence that presented. Indeed the four appellants may well have been involved in the fatal attack, but they also may well not have been involved in the attack and our task is to determine whether on the circumstantial evidence presented, the only reasonable inference is that they were involved in the attack. My view is that, that was not the only reasonable inference that can be drawn and under the circumstances I would uphold the appeal and set aside the conviction and replace it with a finding that they are acquitted.

KATZ, AJ

DLODLO, J: I agree. It is so ordered, in other words the conviction and sentence in respect of all the appellants is set aside and the appellants must be released forthwith, unless they are lawfully in detention for other crimes.

DLODLO, J

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