IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN

High Court Case No.: A97/12
DPP Referece No.: 9/2/5/1-56/12

In the appeal between-

THULANI DYANTYANA Appellant

and

THE STATE Respondent

Coram: **DLODLO J & VAN STADEN AJ**
Heard: **8 June 2012**
Judgment: **8 June 2012**

JUDGMENT

Van Staden, AJ

1. The twenty-four year old appellant, Mr Thulani Dyantyana, was charged with two other accused on two counts of murder and one count of assault with intent to do grievous bodily harm. The alleged crimes were committed on 3 November 2006.

2. The other two accused were acquitted on all the charges, but the appellant was convicted of the murder of a person with the name of Mandisi Nobila also known as Mchelwa ("the deceased") and acquitted on

the other charges. In the charge sheet in respect of the murder of the deceased, it is alleged that the appellant killed the deceased by hitting him with a blunt object and by stabbing him with a sharp object.

3. The appellant was sentenced to ten years imprisonment of which four years were suspended on certain conditions. The appellant applied for leave to appeal against conviction and such leave was granted.

FACTUAL BACKGROUND

4. On the day in question troublemakers kicked in the doors of some houses in Samora Machel Township. Apparently some of the inhabitants of these houses were assaulted and their belongings stolen. A group of at least fifty members of the community assembled and went from house to house to track down those whom they believed to be responsible. The two state witnesses, Ms. Thandaswe Mgidi ("Mgidi") and Mr Monlabu Mayembela ("Mayembela") were, according to their evidence, forced by this group to assist in locating some of the perceived perpetrators.

RELEVANT LEGAL PRINCIPLES

5. In a criminal case evidence should not be separated into compartments. An accused must be acquitted if it is reasonably possible that he/she

might be innocent. The conclusion to convict or to acquit must account for all the evidence. None of the evidence may simply be ignored[1].

6. Corroboration is defined as confirmatory evidence confirming an issue in a material respect. The corroborative evidence must obviously be reliable[2]. A trial court can only determine the probabilities with reference to proven facts or facts which are not in dispute[3].

7. Circumstantial evidence is evidence of a fact or facts from which inferences concerning the primary facts in issue can be made. A conviction based on circumstantial evidence can only be reached if the guilt of an accused is the only reasonably inference from those facts[4]. In the evaluation of evidence inferences must be carefully distinguished from conjecture or speculation. Inferences must furthermore be based on proven facts[5]. This rule applies in respect of inference and conclusions made for the purpose of corroboration as well as for inferences or conclusions made to evaluate the probabilities.

8. The doctrine of common purpose entails that when two or more people, having a common purpose to commit a crime, act together to achieve that purpose, the conduct of each of them in the execution of that purpose is

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[1] S v Van Aswegen 2001 (2) SACR 97 (SCA) at 100 f – 101 e; S v Chabalala 2003 (1) SACR 134 (SCA) paragraph 15.
[2] Schmidt Bewysreg (4th Edition p. 119 en S v Gentle 2005 (1) SACR 420 (SCA) at 403 g - 431 c.
[3] S v Abrahams 1979 (1) SA 203 (AD) at 207 g – h; S v Hammond 2004 (2) SACR 303 (SCA) at 310 b – g.
[4] Schmidt op.cit page 101 – 102; Burger and Others v S (2010) 3 ALL SA 394 (SCA).
[5] Bates and Lloyds Aviation (Pty) Ltd and Another v Aviation Insurance Company 1985 (3) SA 916 (AA) at 939

imputed to the others[6]. It should be noted that common purpose cannot be imputed to a member of a group unless that member knew that the crime would be committed or foresaw the possibility that it may be committed and reconciled himself/herself with that possibility[7]. There must be evidence of active association of an individual accused with the common purpose. Agreement, whether expressed or implied, is one form of active association.

9. Where there is direct evidence of the commission of an offence the giving of a false alibi tends to strengthen the direct evidence. Where it is sought to establish by inference the commission of an offence by an accused or more particularly his subjective state of mind, various considerations may have a bearing on the extent to which his giving of a false alibi should be taken into account against him[8]. A false alibi should be considered on the same basis as a failure to testify. The alibi is rejected but no additional weight can be attached to this evidence of a false alibi in support of the state's case[9].

DISCUSSION OF EVIDENCE AND JUDGMENT

10. Mgidi who was seventeen years old when she testified and fifteen years old when the incident occurred, when questioned by the regional magistrate, stated that she does not know what it means to take an oath in

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[6] Criminal Law; CR Snyman (5th Edition) p 264 – 265; S v Mzwempi 2011 (2) SACR 237 (ECN); S v Mgedezi 1989 (1) SA 687 A at 705 i to 706 c.
[7] Criminal Law (C R Snyman) 5th Edition page 264.
[8] S v Nkombani and Another 1963 (4) SA 877 (AD) at 893f.
[9] Schmidt, Bewysreg (4th Edition) page 107 and S v Mtsweni 1985 (1) SA 595 (AD) at 594f.

court. The regional magistrate thereafter warned her to tell the truth and nothing but the truth. It is relevant to note that her statement to the police was made under oath. The magistrate did not make a finding as to whether or not Mgidi understood the nature and the import of the oath. He also did not properly advise her of the meaning of the oath. On the authority of Lance Bessick v The State, unreported judgment of the full bench of this court, delivered on 29 May 2012 (Case no. A539/2010), it is clear that the evidence of Mgidi was not properly tendered as required in terms of Seciton 164(1) of the Criminal Procedure Act, Act 51 of 1977. However in this matter I believe that it is not necessary to specifically make a finding in this respect. The evidence of Mgidi was in any event so unimpressive that it should not have carried any weight whatsoever. Her statement to the police did not at all reflect her evidence in court. In this statement she for example gave a detailed explanation of how the other deceased, a person named Bantu, was assaulted by the three accused, whereas she testified that she only saw the body of Bantu afterwards. Her evidence of the sequence of events was so confusing that the regional magistrate found it necessary to state during her evidence in chief "*I do not understand half of what you are saying*".

11. There was furthermore a crucial contradiction in the evidence of Mgidi as opposed to that of Mayembela. Mgidi described a person by the name of Zamazama as also being part of the group, whereas Mayembela referred to accused no. 2 as Zamazama. Mayembela testified that it was very dark when the events took place and that one could hardly see anything. His

evidence was that the deceased, was held by the appellant when he emerged from the house where he was staying.

12. The confusion that reigned on the night in question was described by Mayembela as follows:

"all of them were asking the other one was asking another question and the other one was asking another question. So I cannot say – I cannot really say who was asking what because all of them were asking questions."

13. The magistrate described Mgidi as an important witness and stated that her evidence of identification must be approached with caution, because she was a child at the time when the incident occurred. He specifically referred to the fact that Mgidi's evidence deviated from the statement that she made and that she contradicted Mayembela in respect of Zamazama. Despite her evidence that accused no. 2 and 3 were involved and assaulted one of the deceased with a plank and bricks, they were acquitted. Her evidence in that respect and obviously also her evidence that the appellant assaulted the deceased with a golf club, were obviously not accepted by the magistrate. In respect of the appellant however, the magistrate relied on the fact that the two state witnesses knew her better than the other two accused before the court.

14. In respect of the credibility of Mgidi, the magistrate concluded that it is quite likely that her youth played a major when her evidence in court was

not clear and deviated form the contents of her police statement. Rather than regarding her youth as a factor necessitating a cautionary approach, the magistrate utilized it as a factor explaining the shortcomings of her evidence.

15. In my view the evidence of Mayembela was of a better quality than that of Mgidi. He testified that the appellant and the other two accused were the guards looking after him and the deceased. He also testified that the appellant chased Mchelwa when he attempted to escape.

16. In convicting the appellant as opposed to the other two accused the regional magistrate relied heavily on the fact that he was better known to both the witnesses than the other two accused and his identification was therefore regarded as more certain. The other two accused were acquitted because their identification were not proved beyond reasonable doubt. I cannot see how this distinction can be justified.

17. The magistrate did not specifically refer to the doctrine of common purpose, but that was obviously the only basis upon which the appellant could have been found guilty. In my view, although there was evidence justifying a finding that the appellant and also the other two where present at the scene of the murder and formed part of the group of persons, there was no acceptable evidence that they associated themselves with the murder of the deceased. It is not at all clear whether a decision was taken by the group to kill the deceased or by individual members of the group and at what stage such a decision was taken. Applying the legal

principles referred to in paragraphs 7 and 8 above, the inference could not be made that the appellant associated himself with the murder of the deceased.

18. Although the alibi evidence of the appellant was correctly rejected, the deficiencies in the states case was of such a nature that the giving of a false alibi did not strengthen the states case to such a degree that the appellant's guilt was proved beyond reasonable doubt. See paragraph 9 above.

19. In my view it is reasonably possible that the appellant might be innocent.

CONCLUSION

20. In all the circumstances I believe that the conviction of the appellant on Count 1 was not justified and I would set aside the conviction and the sentence of the appellant and find him not guilty.

W H Van Staden,
Acting Judge of the High Court

I agree and it is so ordered.

D V Dlodlo
Judge of the High Court