



Republic of South Africa
In The Western Cape High Court of South Africa

In the matter between

Case Number: A111/2011

Sonwabile Solly Siswana

Appellant

(Accused Number Two)

Versus

The State

Respondent

Judgement delivered on 14 March 2012

Louw J

[1] The appellant who was represented by counsel throughout was arraigned before this court (Cleaver J, sitting with one assessor) as accused number two, together with two co-accused on the following charges which arose from a series of events which occurred during the early hours of Sunday 7 October 2007 at the house of the Sam family situate at No 23479, Calata Crescent, Mandela Park Khayalitsha, Cape Town:

1. Housebreaking with intent to rob and robbery with aggravating circumstances, read with section 51 of Act 105 of 1997.

2. Rape, read with section 51 of Act 105 of 1997.
3. Two counts of Murder, read with section 51 of Act 105 of 1997.
4. Possession of a firearm without a licence.
5. Being in possession of ammunition without a licence to possess a firearm from which the ammunition can be fired.

[2] The three accused pleaded not guilty to all the charges against them and save to state that he was not in the area where the incident occurred and that he was in section 22, at the time, the appellant exercised his right to remain silent. The other two accused also denied being at the place of the incident.

[3] The undisputed evidence adduced by the state established that three men, two of whom were armed with firearms, forced their way into the house of the Sam family during the early hours of the Sunday in question. At the time the members of the family were all asleep. Mr Ntsokolo Samson Sam and his wife Mrs Nowayineti Cecil Sam were in bed in the bedroom, three of their children, Nomaxabiso Constance Sam who was 26 years old at the time, her brother Ali (who had died from an unrelated cause before the trial) and her younger brother, Mzwekhaya Jomo Sam, who was thirteen years old at the time, were sleeping in the dining room together with their uncle, Mr Jonganje Johnson Sam, the brother of their father, who was visiting them. The men proceeded to rob the members of the Sam family of cell phones, money and cigarettes. Thereafter all three raped Ms Sam and the first one raped her

again. Before leaving the house, the men shot and killed Mrs Sam and her brother in law.

[4] There was no admissible evidence implicating accused no 3 in the commission of the crimes and he was discharged at the end of the state case.

[5] The identity of the attackers was the principal issue in dispute at the trial. The case against the appellant and accused no 1 hinged on the reliability of their identification by Jomo Sam as two of the men who had broken into his home and had attacked his family in the manner described. Further, in the case of the appellant, the admissibility of the statement he made to superintendent Cele on 9 October 2007 wherein he admitted his participation in the robbery and in the killing of the two victims (but not the rape of Ms Sam), was challenged, but after a trial within a trial the statement was ruled to be admissible. The state did not seek to rely on a statement made to the police by accused no 1.

[6] The court a quo accepted the evidence of the appellant's statement to Cele and the evidence of Jomo Sam identifying both accused no 1 and the appellant as participants in the attack and rejected their evidence that they were elsewhere on the night in question.

[7] On 2 June 2010 the appellant and accused no 1 were convicted on the counts of housebreaking with the intent to rob and robbery with aggravating circumstances, of the rape of Ms Sam and on two counts of murder. They

were acquitted on the charges of unlawful possession of a fire arm and ammunition.

[8] On 7 June 2010 they were sentenced to twelve years imprisonment on the housebreaking and robbery conviction. On the rape conviction accused no 1 was sentenced to fifteen and the appellant to thirteen years imprisonment. On the murder convictions they were each given two life sentences.

[9] With the leave of the court a quo which was granted on 5 August 2007, the appellant now appeals against his conviction.

[10] The commission and details of the offences of which the appellant was convicted is not in dispute on appeal. Jomo Sam identified both accused no 1 and the appellant as participants in the attack at an identity parade (the ID parade) which was held at the Harare Police station on 10 November 2007. What is in dispute on appeal is the reliability of the appellant's identification by Jomo Sam and the admissibility of the statement he made to Cele.

[11] Jomo Sam told the police soon after the attack that he had seen one of the attackers before and he identified that person as accused no 1 from one of a series of photographs shown to him at the Harare police station. This resulted in the arrest of accused no 1 at his home a few hours later. Soon thereafter, the appellant was arrested at his home.

[12] Mr Kloppe who appeared for the appellant at the appeal submitted that Jomo Sam's identification of the appellant was unreliable and carried insufficient weight to sustain a conviction.

[13] Mr Kloppe emphasised that Jomo Sam was at the time a young boy of two months short of his fourteenth birthday and that he was a single witness in regard to the identification of the appellant. In the dark early hours of the Sunday morning he was unexpectedly woken up by three men who had forced their way into his home. He was thereafter subjected to the traumatic and harrowing experience of his family being attacked and robbed, his sister being repeatedly raped and his mother and uncle being shot to death. He testified that the assailants told them to lie on the floor and to keep their heads covered so that they could not see the assailants. In the circumstances, Jomo Sam did not, he submitted, have the opportunity to have a clear view of the assailants, two of whom he had not seen before.

[14] Jomo Sam testified that he remained on the couch where he had been sleeping and despite being told to do so, he did not cover his head completely. At first he left space to see with one eye only but later he opened the space further so that he could see with both eyes. His sister was raped by the three men approximately one metre from where he lay. The lace curtains on the windows were drawn but the tall flood lights which lit up the area around their house shone through the curtains. In addition, for a short period of time during the occurrence, the light inside the house was switched on. He was, he said, able to see the assailants from where he was lying. He referred

to the three assailants as the short, middle and tall one. At the ID parade Jomo Sam identified accused no 1 as the short and the appellant as the tall assailant, respectively.

[15] Mr Klopper submitted that the composition of the ID parade was unsatisfactory in a number of respects that rendered the identification at the parade of little value. There were sixteen persons on the parade, three of whom were suspects. This, he submitted did not give the witnesses enough non suspects to choose from. The participants varied in age from one who was fourteen years old to one who was twenty five years old. The appellant was nineteen years old at the time. There were only three other nineteen year olds on the parade. Mr Klopper contended that a viewing of the video recording of the parade confirmed that the persons on the parade not only differed significantly in age but also in facial appearance, build and height.

[16] The court a quo recognised that there were differences in the ages of the person on the parade but, correctly in my view held that the age of the persons making up the parade was not a determining factor in this case and held that what was necessary *'was that those on the parade must be more or less similar in appearance, build and height to the suspect'*

[17] The court a quo viewed the video recording of the parade and commented as follows in the judgement:

'We do not consider the choice of persons on the parade to be unsuitable. With the exception of one person who is distinctively shorter than the rest and one who was distinctively taller, we concluded that the remaining persons were more or less of the same build, height and age and appearance as the (two remaining) accused. While some of those on the parade were younger than others we did not consider the difference in age was easily discernable by the viewer. Clearly there will always be differences in the appearance of different people ...'

[18] The members of this appeal bench have looked at the video of the ID parade. Save for the one smaller and one taller person referred to in the judgment of the court a quo (and perhaps one other slightly taller person), the other persons all appear to be of similar age and appearance and in my view the composition of the parade was entirely fair. Warrant officer Barnard was in control of the ID parade and the video recording reveals that his conduct of the parade was proper and procedurally fair. It also showed that Mr Ndinisa, the attorney who represented the appellant and accused no 1 at the parade was present throughout and that he was active in ensuring that the parade was conducted properly and fairly.

[19] Finally, the court a quo found Jomo Sam to be an honest and despite his young age, a reliable witness. A reading of the transcript of his evidence confirms the impression and finding of the trial court in this regard.

[20] In my view the identification of the appellant by Jomo Sam constituted strong and convincing evidence against the appellant.

[21] The second piece of evidence implicating the appellant is his statement to Cele.

[22] It was common cause at the trial that the appellant was assaulted by the police at the Harare police station soon after his arrest. The admissibility of the appellant's statement was challenged at the trial on the basis that the state had failed to prove beyond reasonable doubt that the statement had been made freely and voluntarily.

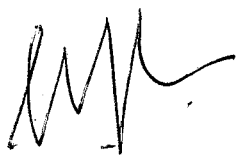
[23] After a comprehensive analysis of the evidence the court a quo found that the assault on the appellant at the Harare police station was not causally linked to the making of the statement and that it therefore did not affect the admissibility of the statement. The court a quo further rejected the appellant's evidence, which was denied by the police witnesses, that he had also been assaulted on various occasions during and after his transfer from Harare police station to the Bellville South police station and that he made the statement pursuant to these assaults.

[24] It is, in my view not necessary for purposes of this appeal to reconsider the admissibility of the appellant's statement. Mr Klopper conceded in argument that if the identification of the appellant is accepted as reliable, the conviction must be confirmed even if the appellant's statement should be

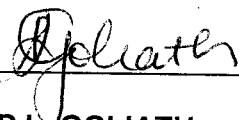
disregarded. In my view, this is a concession that was correctly made. The evidence regarding the identification of the appellant is of such quality and weight that the appellant's unsubstantiated evidence that he was at his home at the time of the attack, cannot be true. In my view, his guilt was proven beyond reasonable doubt.

[25] I would therefore:

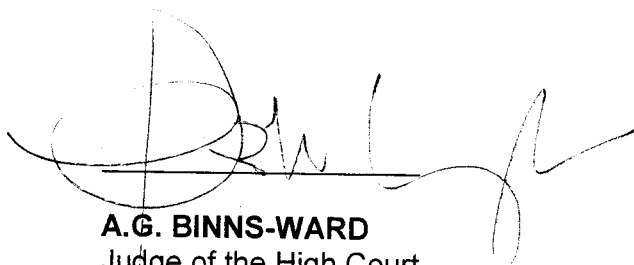
1. Dismiss the appeal; and
2. Confirm the convictions and the sentences imposed.



W.J. LOUW
Judge of the High Court



P.L. GOLIATH
Judge of the High Court



A.G. BINNS-WARD
Judge of the High Court