

✓✓ 14/11/2017

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: A148/2017

Date:

DELETE WHICHEVER IS NOT APPLICABLE

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

14/11/2017
DATE

SIGNATURE

In the matter between:

FELANI MESHACK SEANEGO

JOSEPH MAKHUBELA

FIRST APPELLANT

SECOND APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

PRETORIUS J.

- (1) The appellants were convicted in the High Court, Gauteng Division, Pretoria on 3 November 2011.

Count 1: Murder (read with section 51 of Act 105 of 1997)

Count 2: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 (of the Volkswagen Jetta)

Count 4: Contravening section 3 of Act 60 of 2000 (illegal possession of a firearm)

Count 5: Contravening section 90 of Act 60 of 2000 (illegal possession of ammunition)

And sentenced as follows:

Count 1: 25 years' imprisonment

Count 2: 15 years' imprisonment

Count 4: 4 years' imprisonment

Count 5: 2 years' imprisonment

The court ordered that the sentences on counts 2, 4 and 5 should run concurrently with the sentence on count 1. Effective sentence: 25 years' imprisonment.

- (2) The appellants were legally represented during the trial. The court *a quo* granted leave to appeal against the conviction only.

- (3) The grounds of appeal are firstly, that the State case is full of material contradictions, discrepancies and defects, as well as improbabilities and inconsistencies which caused the court to err when finding that the State had proved its case beyond a reasonable doubt. Secondly, that the court had erred when rejecting the appellants' version as not being reasonably possibly true. Thirdly, that a comedy of errors had occurred in this case as a result of which the appellants did not receive a fair trial.

AD CONVICTION:

- (4) In **S v van der Meyden**¹ Nugent J (as he then was) held:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

These observations by Nugent JA were approved by the Supreme Court of Appeal in **S v van Aswegen**².

- (5) According to Heher JA in **S v Chabalala**³:

"The trial court's approach to the case was, however, holistic

¹ 1999(2) SA 79 (W) at 82E

² 2001(2) SACR 97 (SCA)

³ 2003(1) SACR 134 (SCA) at paragraph 15

and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence."

- (6) This court will only interfere in a trial court's findings of fact and credibility, where these findings are vitiated by irregularity or where it is clear that the findings by the court were clearly wrong.

THE EVIDENCE:

- (7) Ms Kolobe testified that the deceased was her boyfriend. On 18 October 2005 she met her boyfriend and got into his car where it was parked outside the yard. Whilst seated in the car she saw two men,

wearing blue jackets, approaching the car. They walked past the car and then both of them turned back towards the vehicle. The short man produced a firearm and pointed it at them, whilst approaching the driver's side of the vehicle. She tried to get out of the left-hand back door, but the tall man ran to her, pushed her back into the vehicle and she fell on the back seat. She then heard shots being fired and tried to run away, but once more the tall person was blocking the door. She managed to get out of the car as the two perpetrators were both at the deceased's side at that stage. She ran to the next door neighbour, Mr Mnisi. Several minutes passed as Mr Mnisi first had to unlock his house's door, before he could assist. She looked back to where the car had been parked and saw two men pushing the vehicle. She then ran back to the deceased, who was leaning against a gate. Due to his injuries he was transported to the clinic where he was certified as dead.

- (8) Although the witness testified that she was traumatised and could not identify the attackers, she was able to identify the second appellant at the ID parade. Her evidence was that she had identified the second appellant as she had seen him several times during the commission of the crime. Her evidence was that he was the person without a firearm at the scene. He was also the person who had prevented her from leaving the car and she was in close proximity to him. There were two Apollo lights close to the scene and it was light at the scene of the crime. It is clear from her evidence in court that it was initially

translated that she was confused and would not be able to recognise the perpetrators as she had not seen them before. This was cleared up, when she explained that she had been traumatised by the events, but that she would recognise the persons again should she see them. She did identify the second appellant at the ID parade and testified that she did not look closely at the person with the firearm.

- (9) Captain Mogoto testified that he was the investigating officer. He testified to support the State's application to have Alboria Letabo Mhlongo give evidence *in camera* and through a CCTV camera as she was in the witness protection programme. This application was granted.
- (10) Ms Letabo Masango (Albi) testified that she used this name as she was intimidated and threatened by the appellants and other people after the murder of the deceased, although her name was Albara Letabo Mhlongo. Her evidence was that at about 19h00 on 18 October 2005 she left her house to go to the spaza shop. She met the two appellants on her way and greeted them as the first appellant was known to her. He even greeted her by name. As she was returning from the shop she heard a gunshot and a female screaming. She heard a further two to three gun shots. She then saw two persons, entering the car, which then drove in her direction. As the car passed her she saw the first appellant was driving the car. She returned

home, but refrained from telling anybody of what she had seen. Her evidence was that the first appellant approached her on the same evening at house 2887, at approximately 21h45, telling her to keep quiet and threatening her. She had received SMS and telephonic threats, which caused her to give a false name on her statement as she was scared. She also provided the police with three addresses to try and evade threats. She went to the SAPS to make a report, using the name Katlego Moremola, as she was scared to use her own name, due to the threats by the first appellant.

- (11) According to both her and the previous witness, Ms Kolobe, the area was well lit. She corroborated the first witness' evidence that the first appellant was wearing a hat at the time of the commission of the crime. She attended an identity parade, where she identified both the appellants. It is clear that not only did she see the appellants on her way to the shop, but also when they got into the car and drove past her, whilst she was hiding at the tree. She had ample time to identify the two appellants, even more so where the first appellant was known to her before the incident.

- (12) The court cannot fault her for giving a false name and three different addresses, as she was still under witness protection when testifying and was scared of the first appellant.

- (13) The obvious contradiction by Ms Kolobe and Albi was that the appellants had pushed the car, according to Ms Kolobe, but Albi's evidence was that they got into the car and drove it. It is common cause that the two witnesses were not at the same place at the time, Ms Kolobe was at Mr Mnisi's house, close to the vehicle, but Albi was just outside the spaza shop. It cannot be said that they had observed the perpetrators at the same time. There is no reason to make an adverse conclusion about their evidence in these circumstances.
- (14) There was another investigation taking place at more or less the same time as the investigation in this case. The case was Rietgat Case no. 23/2006. The court *a quo* correctly accepted the investigating officer's evidence that he was sure that the pointing out in the Rietgat case, mentioned in court, had nothing to do with the present case and was not related in any manner. It was a red herring to try and exculpate the appellants, but had nothing to do with the present case.
- (15) The respondent makes much of the fact that the appellants' fingerprints were not found on or in the car. It was a state vehicle used by many people during investigations, and the court, in our view correctly, did not find it of any significance.
- (16) The speculation by counsel for the respondent as to why Albie would incriminate the two appellants and the argument regarding the scene

of the crime being that of the Rietgat case, is just that – speculation that takes the matter no further.

- (17) It is so that the question whether Albie was residing at house number 288/7 Block BB was never cleared up. Albie did testify that Captain Mothibe was correct when giving evidence that he resided in house 288/7 Block BB, but it was never put to her that she did not stay at that address. She admitted that she had supplied three addresses as she was scared that the first appellant would harm her as he had threatened to do. She explained that Captain Mothibe is the cousin of her father.

ALIBI EVIDENCE:

- (18) The evidence of the first appellant was dealt with in detail in the court *a quo*. There were material discrepancies between his evidence and his father's evidence. According to the first appellant he had not known the deceased, while his father had testified that he had known the deceased very well. His evidence that he had shown the investigating officer where Albi had kept her taxi whilst he was driving it was never canvassed with the investigating officer. According to the first appellant Albi fabricated all her evidence as she was scorned in love. This is impossible as her evidence corroborates Ms Kolobe's evidence in all material aspects. This, despite her not having known Ms Kolobe prior to the incident.

- (19) The same applies to the second appellant's version, as he testified that Albi would implicate him because he introduced girls to the first appellant. It is important to note that Albi did not previously know the second appellant. Her evidence that she only knew him as Lasbar was confirmed by the second appellant himself.
- (20) The court *a quo* considered all the evidence and had the luxury of observing the witnesses during the trial. It is clear that the court *a quo* viewed all the facts, inherent strength and weaknesses of the case, as well as the probabilities and improbabilities as set out in **S v Van der Meyden**⁴ when finding both appellants guilty of all counts. **S v Chabalala**⁵ is applicable here as it is clear that the court *a quo*'s approach was holistic when dealing with the case in all respects.
- (21) This court cannot fault the court *a quo* for these convictions. The court will, however, intervene regarding the second appellant's conviction on counts 4 and 5, the possession of the firearm and ammunition. The State had conceded during argument that the second appellant should not have been convicted of being in possession of an unlicensed firearm and ammunition. This decision will have no influence on the imposed sentence, as the court *a quo* had ordered these sentences to

⁴ Supra

⁵ Supra

run concurrently with the sentence on count 1.

(22) Therefor the following order is made:

APPELLANT 1:

1. The convictions on counts 1, 2, 4 and 5 are confirmed.

APPELLANT 2:

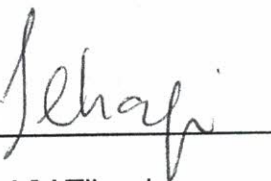
2. The convictions on counts 1 and 2 are confirmed.

3. The convictions ^{and sentences} on counts 4 and 5 are set aside.



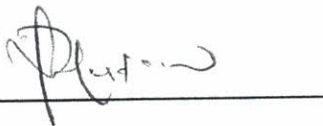
Judge C Pretorius

I agree.



Judge VV Tlhapi

I agree.



Judge TP Mudau

Case number : A148/2017

Matter heard on : 20 October 2017

For the Appellants : Adv RS Matlapeng

Instructed by : Legal Aid Board

For the Respondent : Adv Scheepers

Instructed by : Director of Public Prosecutions

Date of Judgment : 14 November 2017