



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

Case Number: A203/18

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
10/09/2019	
DATE	SIGNATURE

SIBUSISO INNOCENT MAHLANGU  
XOLANI SIMON MAYISELA

First Appellant  
Second Appellant

and

THE STATE

Respondent

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JUDGMENT

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MOLEFE J

[1] The first and second appellants were convicted of murder read with the provisions of section 51(1) of the *Criminal Law Amendment Act 105 of 1997* ('the Act') in the regional court, Benoni on 26 June 2017. They were then sentenced to life imprisonment. The trial court found that there were no compelling and

substantial circumstances to warrant a deviation from the prescribed minimum sentence.

[2] The appellants have an automatic right of appeal in terms of section 10 of the *Judicial Matters Amendment Act 42 of 2013*. This appeal is against both the conviction and sentences.

[3] Before dealing with certain parts of the evidence presented by the State, it will be convenient to specify facts that were common cause during the trial.

3.1 The deceased, Mr Esau Hleza was murdered on 9 October 2016, after being stabbed multiple times with a knife at one Sifiso's house, at Mandela Section, Etwatwa. According to the post-mortem report he had superficial laceration on the face, 8 cm extending from the lateral aspect of the right eye up to the frontal scalp; three incised wounds on left scapula (0,5 cm each, one in mid-clavicular line and the other two medially 2 cm apart); a stab wound of 0,5 cm on the right side of the back, next to the spine; a stab wound next to the left nipple between 3<sup>rd</sup> and 4<sup>th</sup> intercostal space close to the sternum. The cause of death was recorded as being a stabbed heart and lung.

3.2 The two State witnesses were present at Sifiso's house at the time of the killing of the deceased. They had both consumed a large amount of alcohol and used drugs named mandrax on the night of the incident.

3.3 It was dark at the scene of the incident and the only source of illumination in the house was matches lit and an apollo light outside the house.

3.4 The two state witnesses did not report the brutal murder to the police, and none of them could furnish plausible explanation as to why they did not report the incident to the police.

3.5 Both witnesses were implicated in the murder of the deceased by the 'girls' who saw them at the house where the deceased was killed. The girls accompanied the police to one of the state witnesses' home where they were both arrested. Blood (which the witnesses admitted belonged to the deceased) was found on the shoe of one of the witnesses. It was only after their arrest that they implicated the two appellants in the murder of the deceased.

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[4] Keeping the above-mentioned common cause facts in mind, it is then necessary to look at the evidence of both state witnesses critically.

[5] Mr Kagiso Selebalo testified that on the night of 9 October 2016, he was in the company of Mr Sam Mhlanga (known as Mxolisi). They visited several taverns during that night until at 03:00 when they proceeded to Sifiso's place to see the ladies who stayed there. They found nobody at Sifiso's house and the house was dark as there was no electricity. The door was unlocked and they both entered the house and sat on the sofas in the dark.

[6] Approximately ten minutes later, Kagiso saw the two appellants entering the house. The first appellant struck a match and Kagiso testified that he could identify him as he was known to him. The appellants proceeded to the bedroom where they found the deceased lying on the bed. They dragged the deceased from the bedroom whilst assaulting him. They kicked him and struck him on the head with a bottle.

They took him outside and the first appellant took out a knife from his waist and stabbed the deceased several times on his back. Blood was gushing out from the deceased and it got onto Kagiso's clothes, as he was standing close to the deceased as he was being attacked. Kagiso testified that they both left the deceased lying on the ground, gasping and they both went to his house to sleep. He was arrested the following day at his home, owing to a report by one Corky who told the police that he last saw the deceased with Kagiso.

[7] Mr Sam Mhlanga (Mxolisi) corroborated Kagiso's version that they were together on the night of 9 October 2016. They spent the night visiting different taverns, drinking alcohol and using mandrax drugs. In the early hours of the morning they went to Sifiso's house, found nobody at the house, entered the dark house and sat on the sofa in the dining room, and waited for the ladies who resided there. Mxolisi testified that at that time he had consumed 12x750ml of beer, whiskey and used mandrax drugs.

[8] Mxolisi testified that the two appellants then came into the house. The first appellant lit a match and enquired about the girls. He was able to identify both appellants as he knew them for about 10 years. Both appellants proceeded to the bedroom and dragged the deceased from the room. They assaulted him by punching, kicking and hitting him with a bottle on the head. Mxolisi testified that he saw the first appellant taking out a knife and repeatedly stabbing the deceased on the front and back of his body. Kagiso had the deceased's blood on one of his shoe.

[9] After the assault, whilst the deceased was lying on the ground bleeding, they left to go to another tavern to consume more alcohol, but because it was closed, they

went to sleep at Kagiso's home. He testified that they did not report the incident to the police as they were too drunk and high on drugs.

[10] In his defence, the first appellant Mr Sibusiso Mahlangu testified that he knew the two state witness. He testified that on 8 October 2016 in the evening, he was with the second appellant Mr Xolani Mayisela and a certain Thabiso at Cooks tavern, watching a soccer match. They arrived at the tavern at 19:00. At midnight Xolani left the tavern to go home to sleep as he had to go to work the following morning. Sibusiso remained at the tavern with Thabiso and only left for home at 02:00 on 9 October 2016 with his younger brother Simphiwe and went to sleep. He testified that he did not know Sifiso and denied ever being at Sifiso's house where the deceased was killed. He never knew the deceased.

[11] The second appellant Mr Xolani Mayisela testified in his defence. He testified that he knew Kagiso but did not know Mxolisi. He corroborated Sibusiso's testimony that on 8 October 2016, they were at Cook's tavern from 19:00 and that he left after midnight and went home to sleep. Prior to his arrest on 25 October 2016, he did not know Sifiso's house (where the murder took place). He was informed by a certain Banzi that the two state witnesses were responsible for the murder of the deceased.

[12] Our law requires that the guilt of the accused must be proved beyond reasonable doubt. The corollary is that the accused is entitled to be acquitted, if it is reasonably possibly true that he might be innocent. The court has to take all the evidence into account, consider the inherent strengths and weakness, probabilities and improbabilities on both sides. The conclusion of a trial court on factual findings

is deemed to be correct, unless the appeal court is convinced that the assessment of the evidence was wrong<sup>1</sup>.

[13] The issue to be determined is whether the identification of the appellants by the two state witnesses is reliable and whether the guilt of the appellants was proved beyond reasonable doubt.

[14] I am unable to agree that the evidence by the state witnesses was reliable under the circumstances. The trial court, with no expert evidence, found that although they consumed considerable amount of alcohol and drugs "*they conceded that they were high but the alcohol sobered them, notwithstanding this they were in a position to relate to the court in detail their escapades at different taverns as well as the events leading up to the stabbing of the deceased.*"<sup>2</sup> On the totality of the facts, their evidence should not have been accepted without any corroboration by any other reliable extraneous or objective facts.

[15] The learned magistrate summarised and reviewed the circumstances in which the state witnesses identified the appellants and accepted them as both honest and reliable, and found corroboration to have existed in their versions. The differences that their evidence revealed, the learned magistrate reasoned, were not material and did not impact on their credibility. The alibi defences of the appellants were on the other hand, rejected as false. I am unable to agree with the court *a quo* that the appellant's identities were proved beyond reasonable doubt. They had both consumed large amounts of alcohol and used drugs and conceded that they were very drunk on the night in question.

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<sup>1</sup> *R v Dhumayo* 1948 (2) SA 677 D

<sup>2</sup> Record page 185 para 20

[16] Reading the judgment of the court *a quo*, I am of the view that the learned magistrate failed to take the proper approach in this context. No samples were taken from the appellants' homes nor their clothes. In my view, this case was not properly investigated. No forensic investigation of any kind was conducted at the scene of the crime. This astounding failure was not explained by the police.

[17] In the context of the above, it is then necessary to examine the versions of the appellants. They of course bear no *onus* at all. It is only necessary that their evidence should reasonably possibly be true. Both appellants testified that they did not know the deceased person and denied ever being at Sifiso's home where the murder occurred. Their version is that they were both at Cook's tavern and when they left the tavern they both went to their different homes to sleep. Of all the facts of the case, their version could reasonably possibly be true<sup>3</sup>.

[18] Having analysed the evidence, the court *a quo* then found both appellants guilty of murder, based on the unreliable evidence of the state witnesses. Furthermore, there were vital witnesses mentioned by the state witnesses and the appellants: one Banzi who told the appellants that the state witnesses bragged about murdering the deceased, a Cindy and Cocky. None of these people were called to testify and no explanation for their absence was tendered.

[19] In *R v Shekelele and Another*<sup>4</sup>, the court remarked that honest but mistaken identification, causes gross injustices. To avoid such injustices, the court remarked that in all cases that turn on identification of an alleged offender by a witness, the greatest care should be taken to test the evidence. A bold statement that the accused was the one who committed the crime, is not enough. Answers to relevant

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<sup>3</sup> *S v Shackell* 2011 (2) SACR 185 (SCA) at para 30

<sup>4</sup> 1953 (1) SA 636 T at 638 F-G

questions, about the culprits physique, complexion, peculiar features and wearing apparels, if not properly interrogated, just like untested and unexplored bold statements, which have not been inquisitively investigated, like *in casu*, can leave the door wide open for the reasonable possibility of a mistake.

[20] The principles applicable to an appeal on the merits and the approach to be followed by the court of appeal were articulated in *S v Francis*<sup>5</sup> where the following remarks were made:

*"The powers of a court of appeal to interfere with the findings of facts of a trial court are limited. In the absence of any misdirection, the trial court's conclusion, including its acceptance of a witness's evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court on adequate grounds that the trial court was wrong in accepting the witness's evidence – a reasonable doubt will not suffice to interfere with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony".*

[21] In the context of all of the above, and looking at the evidence (or rather, the lack thereof) holistically, I am of the view that a reasonable doubt exists whether or not the appellants committed the murder on the night in question. The result is that the appellants were wrongly convicted and the appeal must succeed.

[22] I need to emphasise that the right to justice does not diminish the impact of the tragic events of 9 October 2013, nor does it reflect lack of empathy and compassion for the suffering of the deceased's family who lost their loved one in a brutal and senseless manner, with no one held accountable.

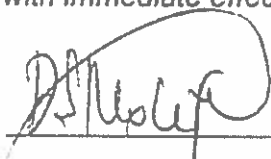
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<sup>5</sup> 1991 (1) SACR 198 (A) at pages 198J – 199A

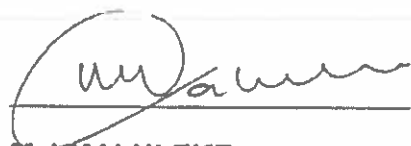


[23] The following order is accordingly made:

1. *The appeal is upheld;*
2. *The conviction(s) and sentence(s) are set aside;*
3. *The Head of the Correctional facility where the accused are being held is ordered to release the appellants with immediate effect.*

  
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**D S MOLEFE**  
**JUDGE OF THE HIGH COURT**

I agree.

  
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**M J MALULEKE**  
**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

**Counsel on behalf of Appellant** : **Adv. M van Wyngaard**  
**Instructed by** : **Saayman Attorneys**

**Counsel on behalf of the State** : **Adv. L A More**  
**Instructed by** : **State Attorneys**

**Date of Hearing** : **31 July 2019**  
**Date of Judgment** : **10 September 2019**