

SOUTH AFRICA / JUDGMENT

Hoyi and Others v S (20/22) [2023] ZAECKMKHC 80 (30 June 2023)

[2023] ZAECKMKHC 80

COURT

Eastern Cape High Court, Makhanda

BEFORE

Cengani-Mbakaza, T V Norman

CASE / FILE NUMBER

20/22

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, MAKHANDA)

Appeal Case No: 20/22

In

the matter between:

SIKHUMBUZO
HOYI
1ST
APPELLANT
LELETHU
PLATANA
2ND
APPELLANT
MFUSI
NTUSHELO
3RD
APPELLANT
ZWELINZIMA
NTSHANGASE
(erstwhile)
ACCUSED 4/DECEASED)
BUYILE
JAMBELA
5TH
APPELLANT
MPUMELELO
DLANGA
6TH

APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

CENGANI-MBAKAZA AJ:

Background

- [1] In any given household, it is common for family members to perform their regular duties, go shopping and attend funerals. The household of Mr Vukile Mabusela's family (the complainant) was not a deviation from everyday existence. He and his wife, Mrs Nosipho Mabusela (the deceased), shared a home in Motherwell in Gqeberha. In their home, they had a combination of big and small consumer appliances. The deceased had pieces of jewellery that she had stored inside a bag in their bedroom. Additionally, the mobile phones were housed in the same space. On an unspecified date, the couple had gone shopping and purchased some apparel which they later stored inside the wardrobe. As anticipated, the garment was to be worn when the opportunity arose.
- [2] On the evening of 11 March 2018, a gloomy cloud hung over the couple's home when intruders budged inside their home. The deceased, who was in the kitchen minding her own daily business after a long day of a funeral service, spotted a suspicious car that had parked next to the residence. The occupants that were inside the car were identified as male persons. The complainant, who was wheelchair-bound, had taken a rest inside the bedroom at that stage.
- [3] Within a space of a moment, the kitchen door was pounded, and someone entered the house. The deceased rushed into the bedroom, closed the door and yelled at the complainant about the intruder's presence. The intruder kicked the bedroom door until it collapsed while the deceased was still clinging to it. Out of shock and terror, the deceased jumped into the bed. An African man speaking IsiXhosa repeatedly warned her to keep quiet. "Where is your husband's belt," asked the intruder. The deceased explained that her husband was unable to wear belts due to his physical impairment.
- [4] The burglar went straight to the wardrobe and collected the garment that the couple had purchased from Woolworths. He opened the complainant's suitcase, took out his jersey and wore it. He further took a black bag and collected shoes and some other clothing. When the deceased was asked about her jewellery, she pointed to a bag that contained rings, earrings, traditional beads, a wallet containing a sum of R3000, 00 notes and watches. The burglar collected all those items, including the purses that were on top of the pedestal and inside the drawers. He further took a total of about four mobile phones inside the house.

- [5] It transpired that the burglar was not alone. The complainant heard a noise of some items that were being dragged into the dining room. A few minutes later, a second man entered the bedroom and said nothing. The one who was with the couple earlier instructed them to cover themselves with blankets. It then became quiet, and the couple assumed that the burglars had left the premises. After about 10 to 15 minutes, they uncovered themselves. The deceased stood up to reach for some help. Again, footsteps were coming inside the kitchen. ‘Who said you must uncover yourselves?’ asked one of the burglars who was inside the bedroom earlier. The burglar covered the couple with a blanket, and three gunshots were fired. From there, they disappeared, and loud footsteps of police officers were heard rushing in. Police identified themselves and approached the deceased, who was lying helplessly on the bed. Police further assisted the complainant by taking him to the dining room while they were conducting police duties inside the premises. They observed that both the kitchen and the bedroom doors were damaged. The deceased was shot in the head. The complainant later discovered that his wife was no more.

The charges

- [6] Following the said events, the Appellants stood trial in the Regional Court, Port Elizabeth) (the court a quo) in respect of the following charges:

Count 1: Housebreaking with intent to rob and robbery (read with the provisions of section 262 (1) and section 260 of the Criminal Procedure Act 51 of 1977);

Count 2: Robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977; and further read with Section 51(2) of the Criminal Law Amendment Act 105 of 1997

Count 3: Murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997;

Count 4 Attempted murder;

Count 5: Possession of an unlicensed firearm in contravention of Section 3 of the Firearms Control Act 60 of 2000 and

Count 6: Contravention of Section 90, read with sections 1, 103, 117; 120(1)(a) and Section 151 of the Firearms Control Act, 60 of 2000 and further read with section 250 of the Criminal Procedure Act, 51 of 1977.

- [7] In the specificity of each charge, the State alleged that the Appellants were at all material times, either before or during or after the commission of the offences, acting in common purpose. The court convicted and sentenced all the Appellants based on the charges proved by the available evidence.[1]
- [8] Aggrieved by the conviction and sentence, the Appellants enjoyed their automatic right of appeal in respect of count 3[2] and appealed against both the conviction and sentence. In respect of counts 1, 2, 5 and 6, the court a quo granted them leave to appeal against conviction and sentence to this court.

The evidence

[9] When asked to describe the assailants, the complainant testified that the first man who entered his room was middle-aged, dark in complexion, with big lips. He collected his items and wore his jersey. He identified this man as Appellant 1, with whom he had spent around 20 minutes in the bedroom. The second man who came in and said nothing was light in complexion, had small eyes and was slender. He had a haircut that had a line on the left side. He identified this man as Appellant no 3. When asked how he could identify the assailants, the complainant testified that he spent a lot of time with Appellant 1 and was able to identify both as he observed their faces and structures. The complainant was further asked to state if he could identify any of the other Appellants in the dock. He informed the court that he knew Appellant 6 very well as his sister's

grandson.

[10] The following is the summary of combined evidence of police officers who were patrolling the area on the night of the incident. These are Sergeants Ray Rossouw, Zoletu Ndavana, Fillis and Malila. These police officers had been working for Crime Prevention Unit for years. On this day, they were performing their police duties in pairs and were using different motor vehicles. A group of about six men was seen emerging from Mpheko Street running. There was a Maroon Toyota Avanza motor vehicle that had parked on the street. They jumped inside the Toyota Avanza and fled. There was also a police van that was at the corner of Nyulutsi and Tyinara Street at that stage. The Avanza collided with the police van. Rossouw, Ndarana and Malila approached the scene and spotted Appellant no 1 trying to hide at the back of the Avanza. The other assailants fled to their heels, but Malila pursued and caught up with Appellant 2.

[11] Rossouw testified that Appellant 1 spontaneously informed him about a murder that had occurred at Mpheko Street. He searched Appellant 1 and found two Nokia cell phones in his possession. As he was busy with police duties, another phone rang in Appellant 1's person. Ndarana searched him again and found another phone, a Motorola, and a brown wallet. Appellant 1 had dressed in a multi-coloured jersey which was later identified as that of the complainant.

[12] On or about five days later, two police officers, namely Sergeants Lengs and Murray, spotted two suspicious males in Greenbush Area. The pair entered a tavern, and they followed them. One of the suspects was in possession of a firearm. He put same down. The officers approached them and searched a bag belonging to one of the suspects. He confiscated a live round 3.8 and some rubber gloves. Because of the curiosity of the patrons who seemed to be interrupting the process, the officers decided to apprehend both suspects and put them in a police van. The officers testified that there was nothing at the back of the bakkie until they recovered a firearm under the seat of the police van where the suspects were. On investigation, the two officers were convinced that the firearm belonged to the suspects. The two suspects were identified as Appellant 3 and a certain 'LK'

who was never charged. The firearm was kept as an exhibit and later sent to the laboratory for forensic analysis.

The undisputed scientific evidence

- [13] Dr Greg Ochabski, a Chief Medical Officer attached to the New Brighton Mortuary, observed two bullet wounds on the deceased's head and opined that the third was an exit wound. Two projectiles were also extracted at the end of the wound tracks. They were sealed in the evidence bag and sent to Warrant Officer Channel Africa, a forensic Science laboratory expert. According to the report compiled, the projectile that was recovered from the deceased's head was fired from the firearm that was recovered during the arrest of Appellant 3.
- [14] Captain Swaartbooi, a fingerprint expert, visited the complainant's home and observed a blue Mazda motor vehicle that was stationary in front of the kitchen. He lifted prints from the said vehicle, some from the Maroon Avanza that was confiscated by the police during arrest and some from the TV and the VCR video machine that were in the complainant's house. Appellants 1 and 2's prints were lifted from the Mazda. Appellant 3's right thumbprint was lifted from the left door of the maroon Avanza. Appellant 5's prints were lifted from the VCR video machine that was found inside the complainant's lounge. The complainant's plasma Television set that was found inside the Maroon Avanza consisted of Appellant 6's fingerprints. Some were identifiable on the bottom part of the TV screen.
- [15] The five Appellants testified in their defence and denied having committed the offences in question. Their evidence is summarised thus: Appellant 1 testified about how he found himself in the car, which is the subject of the criminal activities in question. After he had finished enjoying his drinks at the tavern, he boarded the said Avanza, which was driven by Appellant 2. On the way, they picked up two more passengers. The passenger behind the driver pulled out a firearm and cocked it. He instructed the driver to take a U-turn which he did. When reaching a certain house with a blue Mazda that had parked next to the kitchen door, he was forcefully asked to collect some items and load them in the Avanza, which he did. A police car emerged, and they got inside the Avanza and fled. Appellant 1 testified that amongst the passengers was Appellant 5, who had been sleeping at the back throughout this journey.
- [16] Appellant 2 testified that he was in the company of Appellant 5 when they picked up Appellant 1. Appellant 1 asked to be dropped off at Motherwell to collect some money. He offered to pay extra for that special trip. On arrival at the house at Motherwell (apparently the deceased's house), two men in their company got out of the car. One was holding his cell phone and smoking outside, and from there, he heard that a dog was being beaten. One of the men asked Appellant 5 to wait for them until they finished their mission. The one that was smoking took him out of the car and instructed them to put the appliances inside the Avanza. A police vehicle emerged, and he was forcefully asked to drive off. When the car sped off, it collided with one of the police vehicles. He ran out and later came back to the

police to explain what had happened. Appellant 2 testified that he knows Appellants 3 and 6 by sight. Appellant 2 denied Appellant 1's version that they were pointed with a gun to drive to a certain house at Motherwell. Appellant 2 called his mother, Mrs Mesiwe Platana as a defence witness. Her evidence did not take the case any further.

- [17] Appellant 3 could not explain how his fingerprints were found in the Toyota Avanza, although he once boarded the car on an unknown date. He, however, confirmed that they were arrested at Greenbushes with one Loyiso. He informed the court that the only gun he had knowledge of was the one that was picked up by the police under a beer crate in the tavern. Appellant 3 testified that no firearm was found at the back of the police van. He denied that he was in possession of a firearm at any stage. Appellant 5 is a taxi driver. On the day of the incident, he was joined by Appellant 2. On the way to Motherwell, Appellant 2 borrowed his phone. It was at that moment that he found himself sleeping. He later heard gunshots, jumped out of the car and fled as he feared for his life. Appellant 6 testified that two detectives visited him and informed him that his fingerprints were found in the house that was robbed. He never denied the presence of his fingerprints in the complainant's TV set but explained that

he was once approached to assist in the mending of a television set at Motherwell. He denied that the complainant and the deceased were his relatives.

Appeal against conviction

- [18] Counsel for the Appellants submitted that the State has failed to prove their guilt beyond reasonable doubt[3] and that the court below should have accepted that the version of the Appellants was reasonably possibly true. It was further his argument that the cautionary rules applicable in the evidence of a single witness[4] coupled with the caution that must be applied where identification is an issue[5] were not properly applied by the court a quo. Counsel for the Appellants further contested the admission of evidence of an erstwhile accused 4.
- [19] Counsel for the state opposed the appeal on the basis that the evidence held by the State against the Appellants was overwhelming and that the version of the Appellants was full of contradictions and improbabilities. She further conceded that the evidence of the erstwhile accused was incorrectly admitted by the court below as it amounts to a confession that implicates other Appellants.[6] In *Molimi v State*[7], a case that we were referred to by counsel for the state, the issues up for debate were whether the statements made by accused 1 and 3 were confessions or admissions; whether the statements were admissible against the applicant; whether the trial court and the SCA had complied with s 3(1) (c) of the Law of Evidence Amendment Act 45 of 1988 (the Act); and what the appropriate consequence was. On perusal of the statement of accused 1, the court found that it was unequivocal admission of guilt, which is equivalent to a plea of guilt. It was evident from the statement that accused 1 implicated others. The Constitutional Court held that the Applicant has a right to know a case against him, to cross-examine authors of statements, and not to be expected to

challenge hearsay evidence that is not only inadmissible against him but disavowed under oath by those giving it if the improper admission

of inadmissible evidence resulted in fundamental prejudice to the applicant.

[20] Similarly, during his lifetime, the erstwhile accused 4 [cited as Zwelinzima Ntshangase accused 4/deceased] implicated all the Appellants in the commission of the crimes in question. According to the statement, there was a contract killing that was planned way in advance against the deceased's wife. The role that was to be played by each of the Appellants, including his, is demonstrated in the statement. This is the disquieting feature in the evidence of the state. I find it insignificant to dwell much on this issue save to say that counsel for the Appellants correctly contested the admission of the said statement as it amounts to an inadmissible confession, and the concessions made by the state on appeal were in this regard appropriate.

[21] The question is whether the remainder of evidence that was admitted by the court a quo supports the convictions and sentences in relation to all the appellants.

Applicable law and Evaluation of evidence

[22] The principles which should guide an appellate court in an appeal purely upon facts were set out in *Rex v Dhlumayo and Another*[8] as follows:

“PER SCHREINER, J.A.: Ordinarily the appellant in a criminal appeal has to satisfy the appellate court that the verdict was wrong, at least to the extent that the trial court should have had a reasonable doubt as to his guilt. at para 8 Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.”

[23] To reach a finding that the case was proved beyond reasonable doubt, the trial court evaluated the evidence in its totality.[9] Despite the evidence of inadmissible confession that has been rejected, there is a mosaic of evidence that proves beyond reasonable

doubt that the Appellants were identified, and the complainant's version was consistent with the proved facts. The person who wore his jersey during the attack was Appellant 1, and he was immediately apprehended by the police wearing the same jersey. The so-called 'doctrine of recent possession'[10] further strengthens the state's case in that Appellants 1 and 2 were found in possession of stolen goods immediately, and at the time, they were chased and apprehended by the police. The complainant's cell phones, and a wallet were immediately found in Appellant 1's possession. The Toyota Avanza, which was used as a gate-away car, had some of the complainant's belongings. These items were later identified by the complainant as his. The person that was inside the bedroom and shot the deceased was Appellant 3. He was arrested in possession of a firearm that was linked with the projectiles that were extracted from the deceased's

head. I find that the trial court correctly applied the cautionary rules.

[24] Additionally, all the Appellants are implicated by objective evidence from a fingerprint expert. I accept that the fact that prints were found at the scene of the crime and on objects carry a strong probative weight in linking all the Appellants to the commission of crimes. Captain Swaartbooï's credentials were never placed in dispute. Gleaning from the record, he testified in a coherent, consistent, and credible manner in explaining the process of the lifting of the prints in question until the final analysis was conducted.

[25] Considering the aforesaid, one concludes that the trial court was seized with credibility issues, and this should be the focus of this appeal. The following passage, which is extracted from the case of Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and Others,[11] finds relevance in the present matter:

"The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may

be summarised as follows. To come to a conclusion on the disputed issues the court must make findings on (a) the credibility

of the various factual witnesses, (b) their reliability, and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal

contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail".

[26] It should be borne in mind that the trial court was better placed to decide on credibility issues[12] and correctly found that the version of the State was reliable and that of the Appellants was a mishmash of contradictions and

improbabilities. The evidence of the Appellants cannot be reasonably possibly true while, at the same time, the evidence of the state is 'completely acceptable and unshaken'.[13] The trial court correctly convicted all the Appellants, and the appeal against conviction cannot stand.

Appeal against sentence

[27] The trial court ordered that the sentences in respect of counts 1, 2, 5 and 6 should run concurrently with the sentence in count 3. Each Appellant is facing an effective term of life imprisonment. The sentences in counts 2 and 3 attract a minimum sentence as prescribed in terms of the Criminal Law Amendment Act 105 of 1997. The Supreme Court of Appeal in *S v Malgas*[14] , at paragraph 7, remarked that courts are obliged to impose the prescribed minimum sentences unless there are truly convincing

reasons for departing from them. The Appeal against the sentence is premised on the ground that the court a quo should have found the existence of substantial and compelling circumstances in respect of counts 2 and 3 and that all the sentences

imposed were shockingly inappropriate.

[28] It is well-established that sentencing is pre-eminently the task of the trial court. A Court of appeal will

only interfere with its discretion if the trial court misdirected itself or did not exercise its discretion judicially and properly or if the sentence is startlingly inappropriate. The principles applicable in determining a fair, balanced, and appropriate sentence

have long been settled.[15]

[29] The Constitution guarantees an individual's freedom from all forms of violence from any source[16] , and Section 11 guarantees the right to life. This was a home invasion carried out not by an individual but by repeat offenders, except for Appellant 6, who has no previous convictions against him. As evident from the record, these violent crimes were perpetrated on the most vulnerable members of the society, the elderly. Counsel for the state correctly pointed out that given complainant's dependency on his wife, the deceased, for survival due to his mobility issues, the complainant was essentially helpless when the deceased passed away. Following his wife's death, he was hospitalised on several occasions and had to undergo psychological therapy.

[30] In the sentencing stage, the approach is that the personal circumstances of the offenders are, inter alia, to be considered. Punishment may be regarded as a violation of an individual's right to dignity, privacy, and freedom of

movement. Our society values human rights: hence such transgression calls out to be justified.

[17] In applying Zinn's principles, the court a quo considered all the personal circumstances of the offenders in accordance with the blameworthiness of each offender. [18]

[31] I find that , the court a quo did not misdirect itself in finding that substantial and compelling circumstances were absent in respect of counts 2 and 3, and the sentences imposed in respect of all counts do not induce a sense of shock. There are accordingly no grounds upon which this court would interfere with the convictions and sentences imposed in respect of all the Appellants. Consequently, the Appellants appeals in respect of convictions and sentences must fail.

Order

[32] I accordingly make the following Order :

The appeals against the convictions and sentences of all the appellants are dismissed.

N CENGANI-MBAKAZA

ACTING

- JUDGE OF THE HIGH COURT

I agree.

T. V NORMAN

JUDGE OF THE HIGH COURT

Counsel for the Appellants: Adv Sojada Instructed by: Legal Aid South Africa 69 High Street
MAKHANDA Counsel for the Respondent: Adv W Vos Instructed by: Director of Public
Prosecutions MAKHANDA

DATE OF HEARING: 07 JUNE 2023

DATE OF JUDGMENT: 30 JUNE 2023

[1] Count 1- Housebreaking with intent to rob, Appellants 1, 3, 5 and 6 were sentenced to undergo eight years imprisonment. Appellants 1 and 2 to undergo fifteen years imprisonment. Count 2- Robbery with aggravating circumstances- Appellants 1, 5 and 6 were sentenced to fifteen years imprisonment. Appellants 2 and 3 were sentenced to undergo eighteen years imprisonment. Count 3- Murder, each Appellant was sentenced to undergo life imprisonment. Count 4- Attempted murder- All Appellants were found not guilty and discharged. Count 5-Possession of unlicensed firearm in contravention of Section 3 Act 60 of 2000, each Appellant was sentenced to undergo ten years imprisonment. Count 6- Possession of ammunition in contravention of section 90 Act 60 of 2000, each Appellant was sentenced to undergo two years imprisonment. In terms of Section 103(1) of the Firearms Control Act 60 of 2000- each Appellant remained unfit to possess a firearm.

[2] Section 309(1)(a) of the Criminal Procedure Act no 51 of 1977, the Act

[3] In *S v T*[3] 2005(2) SACR 318 (ECD) at 329 b-e the court held that the state is required, when it tries a person for allegedly committing an offence, to prove the guilt beyond a reasonable doubt. This high standard of proof universally required in civil systems of criminal justice, it is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals, and neither is it a mere technicality. When the court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was indeed the perpetrator of the criminal question.

- [4] Section 208 of Act 51 of 1977 entails that an accused may be convicted on the evidence of a single and competent witness; see also *S v Sauls* 1981(3) SA 172 (A) at 180 E-G
- [5] *S v Mthethwa* 1972(3) SA 766 AD at 768 a-c
- [6] Section 219 provides that no confession made by any person shall be admissible as evidence against another person.
- [7] 2008 (2) SACR at page 76; 2008
- (2) SACR 76 (CC)
- [8] 1948
- (2) SA 677 (A)
- [9] In *S v Van der Meyden* 1991(1) SACR 447 (W) at 449 j-450 b, it was stated that the correct standard is that if the evidence proves the accused's guilt beyond a reasonable doubt, he must be found guilty; conversely, if there is reasonable possibility of his innocence he must be acquitted. The line of reasoning which is appropriate for the court to reach its conclusion must take into account all the evidence depending on the specific facts of the case. 'Some of the evidence might found to be false and some might found to be unreliable and some of it might be found to be only reasonable possible false or unreliable, but none of it may simply be ignored'.
- [10] Hunt, South African Criminal Law and Procedure, Volume 11, third edition
- (1996) 20 (by JRL Milton) page 636 describes the approach as follows: '..... the doctrine of recent possession, is to the effect that if three requirements are satisfied, the court may infer that X stole the goods which were found in his possession. As such the doctrine is simply a common -sense observation on the proof of facts by inference. The three questions which are not easily answered are whether (i) the goods were stolen; and (ii) how recently the property was stolen; and (iii) whether the accused's explanation for his possession is reasonably possible true'.
- [11] 2003
- (1) SA 11 (SCA); 2003 (1) SA p11
- [12] *R V Dhlumayo* (supra) the court further held,
- (3) The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance

and whole personality. This should never be overlooked. (4) Consequently, the appellate court is very reluctant to upset the findings of the trial Judge.

[13] See *S v Van Meyden* (supra)

[14] 2001

(1) SACR 469 SCA

[15] *S v Zinn* 1969(2) AD

[16] Section 12(1)(c) Act 108 of 1996 (The Constitution)

[17] Section 36 of the Constitution

[18] *S v Qamata* 1997(1) SACR 497 E -483

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