

SOUTH AFRICA / JUDGMENT

Mtshashu and Another v S (A231/23)

[2024] ZAWCHC 29 (2 February 2024)

[2024] ZAWCHC 29**COURT**

Western Cape High Court, Cape Town

BEFORE

V C Saldanha, A Cockrell

CASE / FILE NUMBER

A231/23

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Source record**FLYNOTES:**

CRIMINAL – Sentence – Social impact reports
– Convictions
for robbery aggravating and murder – Alibi defense –
Unable to impeach reliability of complainant's
identification of them – No probation officer's
reports were sought regarding background of appellants and their
social circumstances – State failed to obtain an impact
assessment report – Neither did court request such reports
before sentencing appellants – Not warned of application of
minimum sentence legislation – Sentences amended.

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

no.: A231/23

In

the matter between:

LWANELO

MTSHASHU

First Appellant

YONELA

DHYUBHELE

Second Appellant

and

THE

STATE

Respondent

Coram: V C Saldanha J et A Cockrell AJ
Heard: 02 February 2024
Delivered: 02 February 2024

JUDGMENT

SALDANHA J:

[1] This appeal arises in the context of the wretched circumstances of the abuse of alcohol at a tavern in the community of Grabouw situated in the winelands of the Western Cape. The appellants, Mr. Lwanelo Mtshashu and Mr. Yonela Dhyubhele were both convicted on the 24 May 2023 in the regional court Strand of robbery with aggravating circumstances of Mr. Yongama Nyeke, (the complainant,) the murder of Mr. Lutho Majalamba (the deceased) and the unlawful possession of a firearm and ammunition. They were each sentenced to a period of 15 years' imprisonment in respect of the aggravated robbery, life imprisonment in respect of the murder, 15 years' imprisonment in respect of the unlawful possession of a firearm and 1 year imprisonment in respect of the unlawful

possession of ammunition. The sentences were ordered to run concurrently with that of the life sentences.

[2] In light of the provisions of Sections 309(1)(a)[1] with regard to the life sentences imposed by the court a quo, the appellants enjoy an automatic right of appeal in respect of their convictions and sentences.

[3] The charge in respect of count 1, that of robbery with aggravating circumstances arose out of an incident on 9 October 2021 where at or near Waterworks in Grabouw the appellants unlawfully and intentionally threatened Mr. Yongama Nyeke, the complainant with

a firearm and/or a knife, with the intention of inflicting grievous bodily harm on him and removed from his possession, cash in an unknown amount and a Samsung cellular phone. In respect of count 2, that of the murder, on the same day as that of the first count, the appellants unlawfully and intentionally killed Mr Lutho Majalamba by having shot him with a firearm and did so with a common purpose. In respect of the third count, that of the possession of a firearm the appellants were found guilty of having possessed a firearm in contravention of the provisions of sections 3 read with sections 1, 103, 117, 121 A, section 121 read with schedule 4, section 151 of the Firearms Control Act 60 of 2000 further read with sections 250 of the Criminal Procedure Act. The appellants were found to have unlawfully had in their possession a firearm, which firearm was used in the commission of the murder and the aggravated robbery. In respect of the 4th count they were likewise found to have been in the unlawful possession of ammunition, namely a 9mm parabellum cartridge in contravention of the Firearm Arms Control Act. The state alleged and the court a quo found, that in addition to the count of murder, the appellants acted with a common purpose in respect of all the other counts.

- [4] The appellants were legally represented at the trial and pleaded not guilty to all of the charges. They elected not to disclose the basis of their defense. It appeared though, during the course of the trial, each of the appellants relied on the defense of an alibi in that they claimed to have been at a tavern in De Doorns at the time and date of the incidents.
- [5] The appellants confirmed that it had been explained to them by their legal representative that the applicable minimum sentences legislation were applicable to the charge of aggravated robbery and that of murder. On appeal they contended that the application of the minimum sentence in respect of the possession of the unlicensed firearm had not been explained to them by their legal representative nor brought to their attention by the court.
- [6] The State tendered the evidence of a single witness in respect of the charges against the appellants namely, Mr. Nyeke the complainant, in respect of count 1 and an eyewitness in respect of all of the counts. With the consent of the defence, the medico legal autopsy report prepared in respect of the deceased by Dr. Denise Lourens who on 12 October 2021 conducted the autopsy deceased at the Worcester Forensic Pathology Laboratory was handed into evidence. Her chief autopsy findings was that the death of the deceased was caused by a gunshot wound to the left eye. The formal Declaration of Death dated 9 October 2021 by a Mr. Denver Spogter which also diagrammatically indicated the gunshot wound to the left eye of the deceased was handed into evidence. A copy of an extract of the identity document of the deceased that depicted his date of birth as 6 September 1998 and so too an extract of the identity document of the sister of the deceased, Ms Bongiswa Majalamba who identified his body, were handed into evidence. A set of photographs of the scene of the incident that also depicted where the body of the deceased was found after being shot were handed into evidence. An affidavit by Warrant Officer Mduduzi Preston Radebe of the South African Police Services with regard to a spent cartridge found at the scene was likewise handed into evidence. An affidavit by Sergeant Peter Mathele Stembe of the South African Police Services, Grabouw with regard to the conducting of a photo- identification on 21 October 2021 in which the complainant identified the second appellant by appending his signature next to his photograph on a page with nine photographs of other persons. All of the documentary evidence and photographs were handed into evidence with the consent of the defense.
- [7] The appellants testified in their own defense and called no other witnesses. It appeared that their alibi witnesses were unable to attend court notwithstanding the court having repeatedly postponed the matter for their attendance.
- [8] In respect of the conviction, the central challenge to the findings of the court a quo was that relating to the identity of the second appellant. The appellants also contended that no firearm had been found in possession of any of them that linked them to the murder, that the spent cartridge found at the scene had not been linked to any firearm nor as they contended was the proper

chain of evidence established linking an unknown firearm and the 9mm parabellum spent cartridge found at the scene. The appellants also contended that there was no bullet head nor exit wound to the deceased's body linking the spent cartridge to the incident.

[9] The facts in this matter need no more than briefly be set out. On the night of the incident, the complainant was at a tavern that was run from his residence (and owned by his father). The first appellant who he described as his cousin and who was well-known

to him arrived at the tavern and requested beers. Given their relationship and that the first appellant did not have any money the complainant obliged him with two beers. The first appellant left and thereafter returned in the company of two other persons one of whom was the second appellant. The complainant was unable to identify the third person. They asked for more beer and first appellant requested food from the complainant. The complainant again obliged, and dished out food for them and invited them to sit in the front room of the house rather than in the tavern while eating. The deceased at that stage arrived and joined the appellants and the third person in eating the food. The complainant was called by a neighbour and he together with the deceased went over to the premises of the neighbour. On their return he noticed that the appellants and the third person were still busy eating and drinking in the front room of the residence. The complainant proceeded to his own bedroom in which he would store the money which he collected from his neighbour. The first appellant followed him and pointed a firearm at him. The complainant explained that he turned and grabbed at the firearm as at that point he thought that the first appellant was no more than joking with him. He unsuccessfully wrestled for the firearm while the second appellant intervened and stabbed at him with a knife at least twice. On one occasion his hand was scratched with the knife.

[10] The complainant testified that the first appellant exclaimed that he wanted to kill him, the complainant, because his father had collected money for funeral policies from relatives of theirs.

[11] In the course of the struggle for the firearm the complainant explained that a moneybox of his fell to the ground and that the second appellant and the third person helped themselves to the money on the floor. He was unable to state exactly how much was taken.

[12] The complainant testified that while the struggle for the firearm ensued he heard a knock on the door which appeared to have been the deceased. The first appellant opened the door for him and brought him into the bedroom and instructed him to sit on the bed. The first appellant then threatened to shoot him to which the deceased responded by taking off his cap and saying to the first appellant with words to the effect; "you are lying you will not do that." The first appellant thereupon shot him once in the left eye. The appellants and the third person immediately ran away.

- [13] The complainant explained that there were no problems between him and the first appellant. The first appellant, who originally hailed from the Eastern Cape, had at some stage lived with him and his family at their premises. They were good friends and the first appellant had often frequented the tavern. He was aware that the first appellant had obtained employment in De Doorns but regularly returned to Grabouw over weekends.
- [14] The complainant explained that the only lighting in the front room was that which emanated from a television set, but that the lights in the bedroom and the tavern were on. He claimed that he was clearly able to have identified the first appellant and so too, the second appellant although it was the very first time to have met him. The complainant maintained that he had clearly identified the second appellant from the scar above his left eye and the aggression that the second appellant displayed during the course of the incident. He claimed that the second appellant repeatedly said to the first appellant that they should finish him off as they had come there to kill him. He had also identified the second appellant amongst the set of photographs presented to him by the police. That identification process was not challenged.
- [15] As indicated, both of the appellants raised an alibi as a defense. They claimed that on the day and at the time of the incident they were in the company of one another and others and were at a tavern in De Doorns. They claimed that they were wrongly identified by the complainant.
- [16] In her judgment, the acting regional magistrate extensively set out the facts relating to the incident. She was mindful that she was dealing with a single witness and in respect of the identification of the appellants had to exercise the necessary caution. She was also mindful of the oft quoted guidelines in respect of identification, with reference to authority of Holmes JA in *S v Mthethwa*[2] 1972 (3) SA 766 (AD) at 768 a in respect of the appellants and in particular the second appellant.
- [17] The acting regional magistrate was impressed with the testimony of the complainant and found that his identification of both the appellants was both credible and reliable. It was apparent from the evidence that there was sufficient opportunity for the complainant to have observed both of the appellants one of whom he was closely related to and he was able to have made an accurate description of the second appellant with reference to the scar across his left eye and who he specifically recalled as having been aggressive and talkative during the incident.
- [18] The appellants for their part raised no more than an alibi defence and were unable to impeach the reliability of the complainant's identification of them.

- [19] I am more than satisfied that the state had proved beyond reasonable doubt the guilt of the appellants on all four counts and that the acting regional magistrate correctly rejected the version of the appellants. The grounds raised by their legal representative on appeal with regard to the cartridge and the firearm are of no merit inasmuch as it was undisputed that the deceased was killed through a gunshot wound to the eye and that a spent cartridge had been found at the scene of the incident.
- [20] On sentence, the state proved no previous convictions in respect any of the appellants. The appellants' legal representative did no more than to address the court *ex parte* and to place before the court, in a rather perfunctory fashion, the appellants' personal circumstances. That, notwithstanding the fact, that both of the appellants faced a sentence of life imprisonment. No probation officer's reports were sought with regard to the background of the appellants and their social circumstances. Likewise, the State had not bothered to obtain an impact assessment report on the impact of the death of the deceased on his family and likewise perfunctorily addressed the court *ex parte* on sentence. Regrettably, neither did the court request such reports before sentencing the appellants. I will revert to these observations

later in this judgment and reiterate my serious concern about it.

- [21] The first appellant was 23 years old at the time of sentencing and resided in De Doorns. He had a five year old child who lived with a grandmother. He completed grade 7 at school and worked as a general worker at the Kleinberg farm and earned R1950 every fortnight. In respect of the second appellant he was 21 years old at the time of sentence and also resided in De Doorns. He was

single, had two minor children aged 5 and 12, both of whom lived with their grandmother. He completed grade 4 at school and likewise worked as a general worker at the Kleinberg farm where he earned R950 every fortnight. The State contended that there were no substantial and compelling circumstances for the court to deviate from the minimum sentence of life imprisonment in respect of the murder and so too in respect of the robbery and the possession of the firearm. The court in sentencing was mindful of the oft quoted remarks of Marais JA in *S Malgas 2001 (2) SA 1222 (SCA)* that the minimum sentence should not be departed from for flimsy reasons. The court was also particularly mindful of the interests of society and the triad of considerations when sentencing as set out in the matter of *S v Zinn 1969 (2) SA 537 (A)*, that of the personal circumstances of the accused, the nature and seriousness of the offence and the interest of the community. The court *a quo* noted that the robbery was committed against a family member of the first appellant and that he had literally abused his relationship with the complainant despite having generously been given alcohol and food without any charge. It was apparent that the attack on the complainant was no more than senseless and gratuitous and was in my view fueled by the consumption of alcohol. However, I must record that the use of alcohol by the appellants was not *per se* a mitigating factor.

- [22] The court proceeded to impose the 15 year minimum sentence in respect of the robbery with aggravating circumstances. However, it appears from the record that no motivation was provided by the court with regard to the imposition of the life sentences for which the court merely found that there were no substantial and compelling circumstances to have deviated therefrom.
- [23] As already indicated I am particularly concerned that given the seriousness of the offences and the fact that the appellants faced life sentences no reports were obtained by either the defence in respect of the appellants nor by the State in respect of the complainant and the family of the deceased. At most, all we know of the deceased is his name, date of birth, that his sister is Ms Bongiswa Majalamba and that he was a friend of the complainant. Nothing more and least of all, the impact of his death on his family. Nobody bothered. His life was regrettably reduced by the appellants to a disbelieving dare.
- [24] This court has repeatedly pointed out in appeals, both the importance and necessity of social impact reports and that of probation officer reports in respect of accused persons been timeously obtained and placed before trial courts. Little or no effort was made in this matter to do so and it is inexcusable. In my view, it amounts to laziness and a lack of proper regard for not only the victims of the crimes but also the background circumstances of the perpetrators of such heinous crimes.

I am also mindful of the prevalence of such gratuitous violence that manifests on an ever-increasing basis in townships and in particular at taverns over weekends. The scourge of such violence is nothing short of a pandemic and far too often arises in the context of the abuse of alcohol and very often its sale at unlicensed and ever proliferating taverns.

- [25] I am mindful though of the paucity of the personal and social circumstances placed before the court a quo with regard to that of the appellants but noting their ages and the fact that they do not have any previous convictions this court is mindful to no more

than temper their sentences so that they may at the very least be considered at an earlier date for parole. Their conduct nonetheless

deserves a lengthy term of imprisonment.

- [26] In the result I propose to set aside the sentences imposed by the acting regional court magistrate on the second count of murder and that of the possession of the firearm given that they were not warned of the application of the minimum sentence legislation in respect of that count.

- [27] Each of the accused are sentenced as follows:

Count 1 - 15 years' imprisonment.

Count 2 - 30 years' imprisonment

Count 3 – 10 years' imprisonment.

Count 4 – 1 year imprisonment.

All of the sentences are ordered to run concurrently with that in respect of the 30 years' imprisonment for the murder of Mr Lutho Majalamba.

P.S A copy of this judgment is to be furnished by the counsel for appellants directly to the appellants and the management of Legal Aid South Africa. The state is likewise requested to furnish a copy of this judgment to the prosecutor in the court a quo, the Director of Public Prosecutions (DPP Western Cape) and the family of the deceased, the late Mr. Lutho Majalamba. Thank you.

V C SALDANHA

JUDGE OF THE HIGH COURT

I agree.

A COCKRELL

ACTING JUDGE OF THE HIGH COURT

[1] 309 Appeal from lower court by person convicted

- (1) (a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).

[1] 309 Appeal from lower court by person convicted

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- [2] Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.

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