

SOUTH AFRICA / JUDGMENT

S v Felix and Another (CC 18/2023)

[2024] ZAECQBHC 89 (29 February 2024)

[2024] ZAECQBHC 89

COURT

Eastern Cape High Court, Gqeberha

BEFORE

M Makaula

CASE / FILE NUMBER

CC 18/2023

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: GQEBERHA

CASE NO: CC: 18/2023

In the matter between:

THE STATE

AND

LESHWIN FELIX

ACCUSED 1

IGSAAN MALLICK

ACCUSED 2

Application in terms of section 174 of Criminal Procedure Act 51 of 1977

MAKAULA J:

A. Introduction

[1] This is an application in terms of Section 174 of the Criminal Procedure Act 51 of 1977 for the discharge of the accused at the close of the state case.

B. Background

[2] Both accused are charged with the following counts:

1. Wilfully aiding and abetting any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang activity
2. Housebreaking with intent to murder
3. Kidnapping
4. Murder
5. Unlawful possession of a firearm
6. unlawful possession of ammunition

[3] The indictment and the evidence indicate that the offences were committed on the morning of 22 April 2022 between 3H00 and 4H00, at or near Closemore Crescent, Malabar, Gqeberha. In count 1 it is alleged that the accused, the one, the other or both of them acting in concert and in the execution of a common purpose, while members of or actively participated in a criminal gang, to wit the 'upstand dogs' unlawfully and wilfully aided and abetted criminal activity as set out in counts 2 to 6, for the benefit of or at the direction of or association with said criminal gang.

[4] It is further alleged in respect of counts 2 to 6 that on the same date, time and place, the accused broke into the house in which the deceased and Miss Grischerida Arries (conveniently referred to as the complainant) were sleeping with an intention to kill the deceased. Having broken into the house they forcibly removed the deceased and

left with him. Not far away from the house they shot and killed him. Counts 5 and 6 relate to the fact that the deceased was shot and killed by the accused using a 9mm P.A.K and 9mm short calibre firearms. This is as a result of the cartridge cases which were found on the scene and were ballistically tested and linked as such.

[5] The accused pleaded not guilty and furnished plea explanation statements. In a nutshell their defence is an alibi. Accused 1's plea explanation is that at the time of the incident he was at his Aunt's home at 1[...] C[...] Street in Galvandale. Accused 2 stated that from 22H00 until the following morning, he was at his home with his mother.

[6] The state led the evidence of six (6) witnesses to prove its case. Of much relevance at this stage of the proceedings is the evidence of the complainant who was the girlfriend of the deceased. She was with the deceased at the time he was kidnapped and later shot and killed. She is the only witness who identified the accused. The other witness, is the reconstruction expert Warrant Officer Sherwin Walsch who re-constructed the scene of crime as per request from the investigating officer. In doing so, he relied on the information provided to him by the complainant.

C. The Evidence

- [7] The identification of the accused by the complainant is premised on her prior knowledge of them and her identification on the day of the incident. The complaint testified in her evidence in chief, that she knew accused 1 when he was still young. He grew up in front of her. At the time, accused 1 was staying at the first circle at Lola street in Galvendale. She was staying at the second circle in the same street. She knew him by sight and heard his voice only once. Accused 1 would be playing in the street. She did not know his family nor his friends. Prior to seeing him a few week before the incident, she had last seen him 10 years before.
- [8] Her knowledge of accused 1 was critically tested by Mr Saziwa, counsel for accused 1, under cross examination. She estimated accused's 1 age at the time he saw him playing in the streets to have been between 10 and 11 years. She could not recall exactly when she last saw accused 1. Accused 1 and his family left Lola street while she was still in Primary School, which according to the breakdown of years by Mr Saziwa, she must have been fifteen (15) years old. She met him a month or so before the incident at a passage standing with his friends. As stated, that was ten (10) years after she had last seen accused 1.
- [9] She testified that on 22 April 2022, between 3H00 and 4H00 she heard footsteps and the pushing of the back door. They had placed barriers on the door as it had no locking mechanism and was broken. Those people, who she later identified as the accused, gained entry. While inside, they pushed the bedroom door in which they were sleeping. She and the deceased tried to push back the bedroom door preventing them from entering. They were overpowered.
- The door opened. She moved back wards and stood a metre away (as measured) next to the mattress on which they were sleeping.
- The deceased stood behind the door. The accused were shining a torch and the room was well lit because of the torch light.
- Initially, before they entered the house, it was dark as the house did not have electricity. They were using a candle which was not burning at the time the accused entered.
- [10] After they broke in and entered the one caring a torch directed the light of the torch to her face. She could not see because the light blinded her. She put her arm across the eyes. The person moved the torch light and pointed it towards her waist area. It is at that stage that she noticed that it was accused 1 who was carrying the torch. She called him Kafertjie. She also recognised his voice when he was talking to the deceased saying: 'yes we have been looking for you for a long time'. The deceased responded by saying 'ek se what kind.' Accused 1 grabbed the deceased and tried to pull him from behind the door. The deceased resisted. Accused 1 sought assistance from the second person whom she identified as accused 2. Accused 2 obliged and they dragged the deceased and left with him. The deceased was resisting. She got a chance to run to her mother who was in a neighbouring house. She had gun shots immediately after they left with the deceased. She told her mother that it is the

accused who took away the deceased. After a short while, they saw a police van on the street. They approached it and that is when they saw the deceased lying in a pool of blood.

- [11] With regard to the events that took place inside the room, she testified that accused 1 was holding the torch with his right hand. He was wearing a black hoodie top which was covering his head and a black cap. Accused 1 handed the torch over to accused 2 who held it at the position of his thighs. The light was sufficient for her to see what was happening. It was bright inside the room because of the torch light. Accused 2 was also wearing a black hoodie covering his head, black trousers and a black cap. He was wearing a hand glove on his left hand and carrying a gun (black pistol) on his right hand. His beard was visible as to he had long beard because he is a Muslim. He received the torch
- using his right hand but later changed and held the firearm with his left hand. The whole incident took about five (5) minutes i.e from the time they pushed the back door until they left with the deceased.
- [12] She made a statement to the police. She told the police that the deceased was forcibly removed from the house by the accused. She, on subsequently days, pointed the accused at a photo identification parade.
- [13] The complainant stated that the deceased was a gangster and belonged to the 'Gazaaz'. According to her, the accused belonged to the 'upstand dogs' as she would see them in their company. The 'upstand dogs' had a sign on the left eyebrow which is a slanting small shaving across the eyebrow shaped like an 'A'. That is even how she managed to identify them that morning. The cut was even visible on the photos.
- [14] I should mention upfront that the slanting shaving referred to by the complainant are small, almost invisible on the left eyebrows of the accused as depicted on the photo album. Even the shaving of the eyebrows does not follow the same linear direction and do not look like an 'A'. I may readily conclude that under the lighting circumstances described by the complainant, the shaving of the eyebrows could not have been visible to the complainant especially because both were behind the torch light at the time she identified them.
- [15] The complainant confirmed under cross-examination that she never spoke to accused 1 at any stage before the incident. She was never introduced to him nor was she told what his name was. She stated that she could identify the accused even though the light was not directed towards them. The reflection of the white wall helped to reflect the light in the room.
- [16] When questioned by Mr Saziwa about their clothing, she changed to say that accused 1 was wearing a black trouser and glove on his right hand leaving out that he was also wearing a cap. Furthermore, in her evidence in chief, she said accused 1 was wearing the hoodie in such a way that she could see he had no beard as his face and chin were visible. When it was put to her that accused 1 had a goatee (beard on his chin), the complainant changed to say that accused 1 wore the hoodie in such a way that it covered his chin.

[17] The complainant was asked on how she recognised the voice of accused 1 since she had earlier on testified that she never spoke to him. Her response was that accused 1 once confronted her sister in her presence enquiring from her why they were looking at him. When asked why she did not mention that in her evidence, she said she did not consider that to be relevant to this matter as that occurred a long time ago. This is in spite of her having been asked whether she had spoken to accused 1 before. She was asked how could have recognised accused 1's voice having spoken such few words. She did not answer that but insisted that she saw him that morning.

[18] The complainant was referred to his statement to the police which she confirmed was taken in her mother tongue, Afrikaans. She confirmed further that she read the statement and signed. After she was satisfied it reflected what she told the police officer. In the statement the complainant said accused 1 was wearing a hoodie which also covered his mouth contrary to her evidence in chief. She further did not mention in the statement that accused 1 was wearing a black cap, a glove and black trousers. In her statement, she only mentioned that both accused said to the deceased 'hey come' and did not go further to say "they have been looking for him for a long time". Her explanation about accused 1's mouth being covered, she changed her evidence to say that after accused spoke to the deceased, 'he had removed the covering'. When questioned she again changed her evidence to say the following:

"Question: There are 2 problems, how would you have seen his face because he was shining the torch directly in your face.

Answer: After I covered my face they shone the torch downwards. I removed my arm from across my eyes then I looked directly at them.

Question: You are adjusting your evidence because you did not say that at first.

Answer: If, I may mention, it is my mistake, I could see accused 1 whilst it was dark before they shone the torch on me that his mouth was covered.

Question: Are you saying even before the torch was shone at you, you saw his mouth was covered?

Answer: Yes"

[19] As the cross-examination intensified on this evidence and that she has been saying his face was not covered, she stated that it was her first statement and may have forgotten other things which now come out of the many questions she was being asked. It was put to him that the questions she was asked in chief about how accused 1 had been wearing the hoodie, should have jogged her memory, she blamed the police officer who took the statement by saying "His mouth was covered on the lower lip (as demonstrated) and I even told the police officer how it was covered. May be she left it out. I heard a memory loss."

[20] The complainant was told that in her statement, she did not give out the facial features she was able to identify accused 1 with. Her response was that “then he must have neglected to write that down” because she did give him the facial features. The questioning went thus;

“Question: Are you saying you gave the facial features in your statement?”

Answer: Yes and I was still shocked at the time. I could not think logically at that time. I was still very confused and not myself at that stage.”

[21] With respect to the complainant, she was given an opportunity at the time the statement was made and even in court to read it and satisfy herself if her statement included everything she said and wanted to say. It is understandable that she may not have said all she wanted to say when her statement was taken. However, when given an opportunity in court, to check whether she did leave out some of the important things in her statement, she said she was satisfied with it. Furthermore, she if was able to recall that she did mention some of the things to the police officer but he omitted to write them down, she should have been able to pick those up when called upon to check its correctness before signing it. Instead of blaming the police office, she should accept the blame as she said she was not thinking straight as she was still in shock.

[22] The evidence of the complainant conflicts with that of her mother. Her mother testified that accused 1 was staying opposite her house in Galvandale. The complainant said they were staying in circle 2 while accused 1 staying in circle 1. Complainant said accused 1 was about 10 or 11 years when he left their street. She even referred to him as being younger than her. Strange enough they are both 27 years old. Her mother said the complainant was three years old when accused 1 and her family left Galvandale.

D. Analysis

[23] Section 174 of the Criminal Procedure Act 51 of 1977 provides;

“174 Accused mas be discharge at close of case for prosecution

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused

committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.”

[24] Section 174 of the CPA allows a trial court to return a verdict of not guilty at the close of the state case, if the trial court is of the view that there is no evidence upon which a reasonable person might convict an accused of having committed the offence with which

he/she is charged or a competent verdict to that charge. Nugent AJA, as was then, said the following, of which I agree with:

“If, in the opinion of the trial court, there is evidence upon which the accused [1] might reasonably be convicted, its duty is straight forward the accused may not be discharged and the trial must continue to its end. It is when the trial court is of the opinion that there is no evidence upon which the accused might reasonably be convicted that the difficulty arises. The section purports then to give the trial court a discretion it may return a verdict of not guilty and discharge the accused there and then; or it may refuse to discharge the accused thereby placing him on his defence.”

- [25] Credibility of state witnesses is normally not a factor for consideration for the discharge of an accused in terms of section 174 of the CPA. However, credibility of a witness may be taken into account where a high degree of untrustworthiness has been shown.[2] Similarly, this court has a discretion, to take into account the credibility of the state witness especially the complainant.

The complainant is the only witness who was present in the house when the break in and the kidnapping took place. As regards the murder and possession of firearm and ammunition, the state relies on circumstantial evidence because the complaint did not witness the shooting and subsequent killing of the deceased.

- [26] Crucial at this stage is whether the complainant correctly identified the accused as the culprits. The leading case in the issue of the identification in *S v Mthetwa*[3] where Holmes J A formulated the following guiding principles:

“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 by or 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”.

Prior knowledge of the accused

- [27] The complainant attested to her prior knowledge of the accused. As stated above, it is not clear how the complainant knows accused
2. She kept on contradicting herself as to when and how she knew accused 2. She said accused 1 lived in circle 1 and herself in circle 2. This is contradicted by her mother who said they lived in house opposite his. The complainant said accused 1 was young and he grew up in front of her. Surprisingly, they are of the same age i.e 27 years old. She said she was in Primary School when accused 1 left the area. Her mother testified that complainant was 3 years old when accused 1 and his family left the area. Her evidence vacillated between her saying she saw accused 1 on several occasions standing with his friends and members of the ‘upstand dogs’ hence she concluded he belonged to them and seeing him once standing in the passage a month preceding the incident. That cannot be correct as shown in the

preceding paragraphs wherein I dealt with her evidence. It is clear that her prior knowledge of accused 1 is doubtful in the extreme and is compounded by her mother's testimony. I exhaustively dealt with her evidence as regards this aspect above and need not repeat it.

- [28] Apart from being a famous rapper, her knowledge of accused 2 is similarly scanty. She only came to know him when he had been released from prison. She testified that she would see him two to three times a week with his friends. It would be during the day. She never spoke with him and did not know where he lived.

Identification of the accused at the scene

- [29] I have touched on the circumstances under which the offence was perpetrated. It was in the small hours of the morning. The incident occurred inside 5 minutes. That is from the time they forcefully pushed the doors open until when they dragged the deceased out of the house. The only source of light was torch which was initially shone directly in the eyes of the complainant and thereafter pointed downwards on the floor (from waist down as demonstrated by her). The complainant testified the room was light because of the reflection of the wall as it was painted white. She was able to identify them through the reflection because they never directed the light to their faces.
- [30] Apart from the evidence that the torch illuminated the whole room, not much was canvassed about what kind of torch it was and its brightness thereof. The relevance of that portion of evidence became apparent during the cross-examination of warrant officer Sherwin Walsh. In his reconstruction, he relied on the information given to him by the complainant. He conceded under cross-examination that the kind of torch used by the culprits was not described to him. The brightness was also not canvassed with the complainant. The only conclusion therefore is that the brightness of the torch he used could have been different from the one used that day. He further conceded that the conditions could never have been the same because he reconstructed the scene some months if not a year after the incident. He went to the house at about 21h45 whereas the incident occurred between 3H00 and 4H00 am thus conceding that they lighting conditions could not have been the same depending on the conditions of that night. He testified that dark colours absorb light and the white one reflect it. Comparing the walls as at the date of incident and the day of reconstruction, he conceded that the room had been recently painted with bright white colour. That is glaring on the photos. In the lower part of the wall, one could easily notice that the colour is the same as reflected on the photo of the 24 April 2022.
- [31] Warrant Officer Warlsh testified that the complainant advised him that the suspects were at all times behind the torch hence he took a photo reflecting the police officers behind the torch light as depicted by images 4 and 5 of exhibit F. Image 5 reflects, the distance as pointed out by the complainant. From image 5 it is inconceivable that the complainant could have seen the slanting marks on the eyebrows of the accused. One of the officers has a patch of beard below his lower lip as depicted in the photos prior to reconstruction. It is impossible to see that patch of beard from image 5 because of the torch which is pointed in

the direction of where the complainant was standing at the time she identified them. Therefore, based on the above concessions and the observations, the reconstruction of the scene was not of assistance to the issue of identification.

- [32] The issue of lighting, the duration it took, to remove the deceased from the house, the state of mind of the complainant and the time the incident took place, seemingly led to the poor identification of the accused. The complainant, as shown above contradicted herself extensively when it came to how she identified the accused that morning. She confused what they were wearing and how she could have identified them under the circumstances. She testified that she smoked 'tik' which is a drug, late in the afternoon at about 15H00 and the effect of which was that she could not sleep. In the same breath, she denies that it had an effect on her and that her faculties/mind was affected.
- [33] The complainant may have been genuine in saying that the people she saw were the accused. That is even corroborated by the fact that she immediately told her mother and the police that it was the accused she saw pulling the deceased outside. But that is not enough. The issue is the reliability of her evidence. It is vital to look at the circumstances under which the identity occurred. It was in the early hours of the morning, the only source of light was torch whose brightness was not amply canvassed, the time period (5 minutes) within which the offence took place, the mobility of the scene (the complainant said the accused wrestled with the deceased from behind the door, out of the bedroom until they got him outside.) The errors she made in identifying the accused have a bearing in her observation. (facial features and what they were wearing and how they were wearing, the hoodies caps and hand gloves) and lack of prior knowledge of the accused militate against the reliability of her identification of the accused.
- [34] As aforesaid, the evidence of her identification of the accused is poor. The accused under the circumstances cannot to be put in their defence. For these reasons, the accused should be acquitted at this stage of the proceedings.

The following order shall issue:

1. The accused are acquitted following the application of the provisions of section 174 of the Criminal Procedure Act and therefore are found not guilty and discharged.

M MAKAULA

JUDGE OF THE HIGH COURT

For the State

: Adv McKay

For Accused 1

: Adv Saziwa

Instructed by

: Legal Aid

Gqeberha

For Accused 2

: Ms Strydom

Date delivered

: 29 February 2024

[1] S v Lubaxa 2001 (2) SACR 703 AT 706 BB)

[2] S v Mojapelo JDR 0810 (SCA) at [22] and S V Botha [2017] ZASCA 148 at [34].

[3] 1972(3) SA 767 *(AD) at page 768 A-C

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