IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION - BISHO

CASE NO. CAR 7/11

WANGA MONQO Appellant

vs

THE STATE Respondent

JUDGMENT

MGXAJI AJ;

INTRODUCTION

1. The appellants were convicted on the 06 June 2010 by the Regional Court sitting at Peddie.

2. On the 29 November 2010 the appellants were sentenced to 28 years imprisonment. The Magistrate found there to be existing substantial and compelling circumstances and deviated from applying the minimum sentences in terms of the Criminal Law Amendment Act 105 of 1997.

3. In the Court a quo there were three accused persons who were convicted as charged having pleaded not guilty to

the charges at the commencement of their trial. Of the three of them only accused 1 and 2 appealed their conviction and sentence.

4. On the 6 December 2012, the appellants were granted Leave to Appeal their conviction and sentence.

5. The deceased, Boniswa Mafani, an aunt to the first appellant by virtue of being born in the same clan with the appellant's father, had been sleeping together with the 1st appellant's father Fanelekile Monqo and her sister Vuyiswa of the same clan in the rondavel at the first appellant's home. In this rondavel there was a homebrewed Xhosa beer for a traditional ceremony to take place the following day the 3 March 2007.

6. At about 21h00 the appellants arrived at this rondavel and woke up the deceased and her sister, the said Vuyiswa, accusing them of being naked as well as questioning them for sleeping at the house where the traditional beer was kept.

7. The deceased's sister, after being woken by the appellants and physically confronted, ran away while the deceased was left cornered by the appellants to meet her fate that night. The deceased was found dead in the morning with her throat slit. The appellants denied responsibility for her death with the 1st appellant admitting only to assaulting the deceased twice with a stick and the third blow landing on the 2nd appellant's hand who

according to the latter's evidence at court was intervening on behalf of the deceased. The 2nd appellant corroborates this version under chief examination by his attorney but under cross examination admit the deceased having been assaulted with heavy blows by the 1st appellant even when the deceased was outside to where she had run to chased by the appellants from the hut. This assault outside is much corroborated by the 3rd accused and it is this commotion that woke the witness Mzwamadoda Manqo in his sleep to find the deceased lying down motionless with the appellants and the 3rd accused standing over her body.

8. Arguing on behalf of the appellants Mr Price contended that the death of the deceased was caused by the 3rd accused in the absence of the appellants at the time, possibly the deceased was left by the appellants lying on the ground outside infront of the hut where the deceased had been sleeping with the 1st appellant's father being also whereat Beer was kept. Hence, so the argument goes, the deceased was found in the morning beyond the kraal being not where the appellants had left her at night. Furthermore the 3rd accused, who according to the appellants entered the hut into which they were called by Mzwamadoda Manqo after he had found them standing outside the hut over the deceased lying body, must have, after having been expelled from the house, killed the deceased because when the appellants followed Mzwamadoda Manqo to sleep at the hut the latter and his

father were sleeping at, they no longer saw the deceased where they had left her lying when they entered the hut.

APPEAL AGAINST CONVICTION

9. The guiding legal principle in appeal considerations is whether the court against whose finding the appeal is, misdirected itself on material facts in arriving at its decision. Inescapably such material misdirection has to be demonstrated sufficiently by traversing the facts and the reasons on which the trial Court based the decision appealed against. In this regard the often quoted *S v Hadebe & others 1997 (2) SACR 641 (SCA)* at page 645 e-f case is salutary…: "there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by the appellate courts to factual findings of the trial court are so well known that a statement is unnecessary". This affirmed the principles set out and established in *R v Dhlumayo 1948 (2) SA 677(A)* .

10. Mere allegations of contradictions less material in the evidence conspectus considered upon which the trial court based its findings will not be enough for the appeal court to assess as having been erroneous the trial court's evaluation of evidence. The evidence in the record must be of such a nature that materially the State failed to

prove its case beyond reasonable doubt for the trial court to have convicted the appellants.

11. In the record the only person who hit the deceased and manhandled her dragging her outside the hut in which she and the 1st appellant and Vuyiswa had been sleeping before being rudely and disrespectfully awoken up by the appellants is the first appellant. Not only did this unprovoked assault by the 1st appellant prompt intervention in vain by the 1st appellant's father, it also induced him to leave the appellants for another hut. The 1st appellant admit in chief having manhandled the deceased so that she could return her into the hut to lock her in so that the deceased could repeat the following day the witchcraft things she had said about the 1st appellant.

12. The witness Mzwamadoda Monqo in his sleep reacted to a noise outside where he found the appellants and the 3rd Accused in the court a quo standing over the motionless lying down body of the deceased with the 1st appellant only responding to his explanation seeking questions on the factual occurrence. The Magistrate considered the evidence of the 3rd Accused and that of Dr Wingreen on the nature of the injuries on the hands , body and as well the throat of the deceased and found them consistent with the assault admitted by the 1st appellant albeit the latter admitting to only two stick blows on the deceased body.

13. The summary of evidence by the magistrate of the appellants' testimony, the 3rd Accused and of Mzwamadoda Monqo accurately reflects the testimony as given by them at court and renders it unnecessary to regurgitate such evidence here.

14. Mr Price argued before this court that the appellants had unfair trial on the basis that the appellants' own attorney asked dangerous questions to the 1st appellant. Not only was this not the ground of the appeal but also in itself the argument that mere dangerous questions and answers elicited by the 1st appellant's own Attorney from the 1st appellant render unfair the trial without violating the appellant's own case presentation ,in my view, lacks substance. Not only was the 1st appellant's attorney properly qualified, the 1st appellant in the court record as well showed no discomfort let alone objection or reluctance to answer questions by his own attorney to whom they had given instructions on their defence case. In any event this aspect was pointed out in argument but was not pursued.

15. It is not substantiated how answers given under chief examination by the 1st appellant that may be against his own interests put by his own legal representative in the same way the appellant could give answers under cross examination that are against his own interests in the trial do render unfair the trial. Such argument, in my view, is erroneous and strange. It renders hollow the very legal

trial machinery that where there are no irregularities vitiating the trial the mere answers volunteered or elicited from an accused which assist the State in its case ipso facto render unfair the trial. In short where an accused who has pleaded not guilty to a charge and in his defence case presentation legally represented proffers answers which prove his role in the offence commission or assist the State case does not, in my view, by any means render, without anything further, his trial unfair.

16. The first appellant admits hitting the deceased and dragging her with 2nd appellant outside the house with a view to detain her and to compel her to repeat her statements to the elders the following day.

17. It is argued by Mr Price that the 3rd Accused, who testified having arrived joining the appellants while assaulting the deceased who was lying down on the ground beseeching him to finish off the killing of the witch which accused no3 did with his knife, was a poor witness without any basis advanced on the critical aspect of assault and stabbing perpetrated upon the deceased at the 1st appellants homestead on that night. The appellants fail to attribute the assault on the deceased, which the 1st appellant admit to, to any other person other than them however minimal the assault they admit to. What reflects clearly in the record is that the motionless lying state in which the deceased was when found by the witness Mzwamadoda Monqo and over whose body the appellants and the 3rd

Accused stood was lifeless at the time and when Mzwamadoda Monqo in his investigation ordered the appellants and the 3rd Accused into the hut where the traditional beer was kept, the deceased was already dead.

18. I am satisfied on my examination of the recorded evidence that there was no misdirection by the magistrate in her finding that the State proved its case beyond reasonable doubt. Her rejection of the applicants' evidence who even deny the 3rd Accused was with them when the witness Mzwamadoda Monqo found them when confronting them for an explanation on the deceased is well made. The Appellants were just pathetic contrary to the submission on their behalf that they were good witnesses. Their forlon exculpatory attempt to attribute the assault causing the death of the deceased exclusively to the 3rd Accused whom they claim must have arrived long after they had entered the hut in which traditional Beer was kept after Mzwamadoda had summoned them into, is such a fanciful footwork bereft of any sense imaginable in this world. So callous was the appellants' assault and murder of the deceased who they had awaken in her peaceful sleep at her brother's homestead unanticipatingly relaxed and unapprehensive of any harm that could befall her.

19. In the record there is no evidence that the deceased was ever with accused no 3 only at any stage save when the

accused no 3 joined the appellants when assaulting the deceased to her death. The argument on behalf of the appellants that the deceased was, possibly, killed only by the 3rd accused after the appellants had gone to sleep has no factual and evidential basis at all.

20. The appellants noted their appeal and advanced in such notice of appeal the ground that the Regional court Magistrate erred in accepting the evidence of Mzwamadoda Manqo and Fanekile Manqo in the light of the observations set out in Paragraphs 2.1 to 2.9 of the application for Leave to Appeal. It is, however, not clearly set out on what basis the Magistrate is said to have erred in accepting the evidence of Mzwamadoda Manqo who testified that he was not himself drunk, an assertion that was not never contested by the defence attorney, neither the gist of his evidence on what he observed and was told by the accused when he found them standing over the lying body of the deceased, was it refuted as being inaccurate for whatever reason conceivable. As for the appellants, specifically the first appellant, on the aspect of drunkenness they admitted to having been drunk but not too drunk not to have known what they were doing.

21. It is not in dispute that Mzwamadoda Manqo quizzed the accused when he found them standing over the deceased body after having been woken up by what he heard as happening outside infront of the houses. It is not denied still that at that moment it was the deceased who was

lying down not reacting to anything. Infact the identity of the appellants and accused no3 standing over the lying body of the deceased as testified by Mzwamadoda Manqo is not denied .It therefore cannot be argued to the contrary that the appellants and accused no 3 were the last persons to physically handle the deceased as testified by Mzwamadoda Manqo as at the time the deceased was lying motionless with the appellants and accused no3 standing over her body albeit the witness Mzwamadoda Manqo testifies not having noticed any wound or blood in the deceased. The appellants do not dispute that at that moment the deceased was lying motionless.

22. From the record there is no evidence of the deceased being alive after the Appellants and accused no 3 were found standing over her lying body. It is also not the evidence of the accused that the deceased was alive at the time Mzwamadoda Manqo intervened. Infact the deceased at this moment was lying down on her side and motionless not even reacting to intervention by Mzwamadoda Manqo which was to her rescue in the circumstances.

23. The inference drawn by the Regional Magistrate that the deceased was dead, at the time Mzwamadoda Manqo arrived at them is the only reasonable inference that could be drawn which is consistent with the facts and possibilities, and how much such possibilities may be have no material bearing.

24. On these facts nothing prevents an inference from being drawn. See in this regard *S v Reddy & Others 1996 (2) SACR 1 at 8c-d.* There is no evidence of any person who interacted with the deceased save the appellants and accused no 3 at the time Mzwamadoda Manqo found the deceased lying down still. The argument that the death of the deceased could be attributed to any stage but not when the motionless body of the deceased was seen with the appellants and accused no 3 standing over it as was found by the Witness Mr Mzwamadoda Manqo ,is more creative thinking without factual basis.

The Appellants themselves did not give evidence to that effect but only contended with casting suspicion on accused no3 as a possible person who might have killed the deceased without any factual evidentiary basis. The 1st Appellant admits as much that the state witness Mzwamadoda Manqo found them standing outside when he confronted them on what was happening and only after did they enter the hut out of which the deceased had been chased. Infact the idea of the 1st Appellant was to force the deceased back into the hut for her to explain her weird statements to the elders the following day. As to when the 1st Appellant abandoned that idea and decide to leave the deceased lying down on the ground remains unexplained by the Appellants. Logically the 1st Appellant would not have pursued that resolve of forcing the deceased back into the hut if she had died at the time the 1st Appellant directed the witness Mzwamadoda Manqo to

enter into the hut for an explanation by the Appellants on the scuffle.

25. It does not appear in the record that the evidence of the state witnesses Fumanekile Manqo, Thando Daso and Macebo Kakancu ever constituted material evidentiary basis upon which the Regional Magistrate convicted the accused and that was not the argument even during the hearing of the appeal. For that reason nothing much of value turns on their evidence on the crucial issues in this appeal in as much as their evidence was considered, as it seems correctly so, in the general evaluation of the evidence of the State and defence evidence.

26. The material relevance of the evidence of accused no3 relates only to the actual assault on the deceased. Precisely to the time accused no3 finds the appellants with the deceased lying down outside the hut. It seems the probative value of his evidence is on the aspect which the Regional Court Magistrate relied on in convicting the appellants which is the direct evidence on the murder of the deceased.

27. Accused no 3's testimony is that the appellants told him that they were killing the witch. This evidence of the deceased being the witch and having to explain her unpalatable utterances that the 1st appellant is "*hard*" corroborates the 1st appellant's own evidence on the deceased's evil acts, hence the 1st appellant's assault on the deceased whilst inside the hut and following the deceased attempted escape, and

subsequent chase to prevent the deceased from such escaping. Otherwise nowhere else accused no 3 in the record obtained the 1st appellant's witchcraft accusations against the deceased. On this material evidentiary aspect which laid the basis for the conviction of the appellants nothing is erred by the Regional Magistrate in finding corroborative value in this evidence.

28. The appellants attack the Regional Court Magistrate as having erred in finding that accused no3 was telling the truth to the court. From the record it appears that the Regional Magistrate was alive to the shortcomings in the evidence of accused no3.Although the Regional Magistrate erroneously categorised the accused no3 as an accomplice instead of co-perpetrator, it does seem that it was more with a sieve that she assessed the evidence of accused no3 and accepted his evidence on the material aspect relative to the circumstances in which the deceased met her fate. As a co-perpetrator aspects of accused no3's evidence would expectedly have possible intentional untruths but certainly it does not ordinarily follow that all his evidence should be rejected. It is salutary to indicate that evidence that has mistakes or lies carries the same weight neither do such mistakes or lies in all circumstances render the entire evidence suspect. See in this regard *S v Mkohle 1990 (1) SACR 95 at 98f-h.*

29. The conviction of the appellants flows from their participation in the assault circumstances in which the deceased died at 1st appellant's home when she was assaulted admittedly by

the 1st appellant when the latter wanted to force the deceased back into the hut from which the deceased had escaped being assaulted by the appellants, an objective over which the appellants acted in consonance, with accused no3 joining them outside that hut when the deceased was already floored lying on her side. Infact accused no3 admits slitting the deceased neck after joining the appellants at a time when the deceased was already in a lying position and was no longer physically reactive.

30. It does not become necessary to deal with other grounds regarding the reports by accused no3 to Thando Dosa and Macebo Kakancu which could only be extrajudicial admissions but not confessions, whether the accused was instructed by 1st or 2nd appellant since these grounds do not deal with the material evidence upon which she convicted nor did the Regional Court Magistrate in her judgement attach too much evidentiary weight and therefore convicted on that basis thereof.

31. It is clear that the Regional Court Magistrate evaluated the entire evidence in particular the improbabilities in the appellants' versions which render such versions substantially untrue. The appellants, accused no3 and the witness Mzwamadoda Manqo corroborate each other that the deceased was lying motionless with accused no3 having joined the appellants who were standing over the body of the deceased Mzwamadoda Manqo as well testified confronting the appellants who were with accused no 3 standing over the

lying motionless body of the deceased. From these evidential facts one inference is capable of being drawn in the circumstances of this matter and that is the deceased was motionless because she was dead at the time. Hence on the 1st appellant's evidence they left the deceased there lying still and entered the hut all of them although he says accused no3 entered later when already they were in the hut. As stated in *S v Sithole & others 1999 (1) SACR 585(W) at 590* the test was put as always to be *" There is only one test in a criminal case and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand each one being corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true ,there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken".*

I therefore find that there is no merit in the appeal against conviction and that the appellants were properly convicted by the magistrate.

APPEAL AGAINST SENTENCE

32. The appellants were charged with murder, an offence that in terms of part 1 of schedule 2 of section 51 (d) of Act 105 of 1997, attracts a life imprisonment sentence unless justification for a lesser sentence is found on grounds of substantial and compelling circumstances. The magistrate took the view that due to the drunkenness of the appellants, the circumstances and the manner the appellants handled the deceased relatively constituted substantial and compelling circumstances.

33. It lies not with this court to traverse the cogency or paucity of basis for the determination that the appellants' drunkenness, the circumstances alluded to, but not specified, of the case and the manner the magistrate found the deceased was handled by the appellants, constituted substantial and compelling circumstances in this case as the appellant have not appealed against this finding but the actual sentence which the magistrate imposed. That the appellants have not challenged this conclusion that there were substantial and compelling circumstances is not surprising.

34. The magistrate, consistent with her finding of substantial and compelling circumstances to be existing justifying a lesser sentence to be imposed in terms of section 51 of Act 105 of 1997, went on to impose on each of the appellants a 28 years imprisonment term.

35. In terms of section 51 (3)(a) the magistrate is well within her discretion, having found substantial and compelling circumstances to be existing for a lesser sentence, to sentence the appellants to a term of imprisonment for a period not exceeding 30 years.

36. That appellants have not shown in what respect could there be a misdirection in that sentence and none has been pointed at by their Counsel. The argument that life imprisonment is anyway not exceeding 25 years is merely an emotional outpouring in view of the clear legislative enactment on minimum sentence for Part 1 of schedule 2 offence for which the appellants were convicted. Decrying the 28 year sentence on the basis of the 1st appellant being the first offender is not sufficient a ground to argue for interference with the sentence imposed by the magistrate in as much as that aspect of the 1st appellant being the first offender remains a flimsy reason as categorised in *S v Malgas 2011(1) SACR 469 SCA* to be the basis to depart from the prescribed sentences. This could as much be extended to the sentence of 28 years imprisonment imposed that it cannot be altered on the basis only that the 1st appellant is the first offender. Justice in its material sense is about the living as it is about the dead.

37. This court's power to interfere with the discretion of the court a quo on sentence is not untrammelled and again S v Malgas case quoted above is guiding on this aspect "A court exercising appellate jurisdiction cannot, in the absence of

material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. It may do so when the disparity between the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling", and disturbingly inappropriate"….In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned".

38. I do not find the 28year's imprisonment imposed as constituting a such sufficient substantial disparity to the life imprisonment prescribed in terms of the minimum sentences legislation as to prompt interference by this court.

39. In the result I make the following order that:

(a) That the appeal against conviction and sentence is dismissed.

ACTING JUDGE OF THE HIGH COURT
MGXAJI AJ

I agree: DUKADA J

JUDGE OF THE HIGH COURT
DUKADAJ

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Appeal heard on : 23 November 2012

Judgment delivered on : 01 August 2013