IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

10 September 2020
DATE

SIGNATURE

CASE NUMBER: A248/2018

In the matter between:

THABO STEVEN MTHIMUNYE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The appellant was convicted in the Regional Court, Gauteng on two counts, being Count 1 of Murder and Count 2 of Robbery with Aggravating Circumstances. He was sentenced to imprisonment for 25 and 20 years respectively. It was not ordered that the sentences run concurrently. Leave was granted on petition to appeal his convictions and sentences.

[2] The appellant initially appeared with two co-accused. The second accused died during the trial and the third accused was found not guilty of both counts and he was discharged.

[3] At the trial the appellant pleaded not guilty to both counts and the formal admissions made in terms of section 220 of the Criminal Procedure Act 51 of 1977 (as amended) related to the identity of the deceased and to the cause of death.

BACKGROUND

[4] Amos Sibiya (Mr Sibiya) was employed as a prison warder at the time of the incident. On 1 February 1998 his brother Johan Sibiya ('the deceased') paid him a visit. Between 19:00 and 20:00 hours he accompanied the deceased on foot, to his place of residence. There were no street lights in the area. As they were conversing with each other they stopped at some point as he was intending to turn back, because his brother had almost reached his destination. They were still conversing with each other when he noticed a group of four men approach them. One of them called his brother by his nickname Lombos and he gained the impression that they knew each other. Two of the men were in possession of firearms. None of the men were known to him. One of them who was in possession of a firearm came towards him and robbed him of his firearm, which was tucked to his left, in front, in a holster and under the T-shirt he was wearing. The man retreated and stood two metres away from him.

[5] Amos testified that he tried to retrieve his firearm from this person but he realised that he was in possession of a firearm and, immediately several shots were fired. The other three

men stood about three to four metres away from him. He does not know who fired the shots, the attack happened very quickly. The incident took place next to a wall of some residence. He managed to scale the wall leaving his brother behind. He ran all the way to the police station where the incident was reported. On arrival at the scene in the company of the police, he came across the body of his brother who had succumbed to a gunshot wound. The police took over the crime scene and retrieved spent cartridges.

[6] Four months after the incident and while on duty at the Moderbee Prison, he recognized the appellant among 70 or more prisoners who were admitted to the prison via reception. In that area searches were conducted of the prisoners before admission into the prison. He did not search the appellant but he confronted him and enquired about his firearm. This identification of the appellant happened before he was called by the police at Etwatwa to identify his firearm. At the same prison he also identified accused 2, five or six months after identifying the appellant. At the trial he did a dock identification of the two men. He did not know accused 3.

[7] Mr Sibiya was informed that his firearm had been recovered. He confirmed the details of his firearm licence which was issued on 97/12/10. The firearm was described as a Norinko nine -millimetre parabellum number 507130 IO. The serial number had been obliterated. When he was robbed, the magazine contained 15 rounds of bullets. He testified that he immediately recognized the firearm as his and recalled only the last numbers of the serial number inside the chamber, which he mentioned as 130 before he took the firearm apart in the presence of Inspector Madela.

[8] In cross examination he was asked at what time he accompanied his brother and he stated that he did not think of the time but that it was slightly dark. Furthermore, he stated that during the incident he concentrated more on the appellant and on the person next to him. As soon as the appellant retreated after robbing him, his brother asked what was happening and immediately shots were fired. When asked what was striking and what in the features of the appellant made identification possible, his response was that he had seen him on the day of incident but he could not give any other description. He denied having participated with other prison warders in an assault on the appellant.

[9] Mr Motsepe is a police officer attached to the ballistic unit of the Forensic Science Laboratory as an examiner of firearms, ammunition and tool marks. On 25 May 1998 he received five cartridges in a sealed envelope under Etwatwa Case 09/02/98. He did a microscopic investigation and found that the five fired 9mm parabellum cartridge cases marked by him 6910/98 B – F, were fired from the same firearm.

[10] Mr Motswetsa is an Inspector attached to the Flying Squad Unit of the South African Police at Springs. On 12 April 1998 while in the company of his colleague Inspector Greyling they were summoned to a crime scene by radio. On their approach they noticed a movement of people who were pointing towards an open veld and they saw accused 1 and 3 on the other side of the veld voluntarily walking towards them. Accused 2 was not present. He is not sure which of the accused arrived first, but both the accused were made to lie on the ground. A firearm was retrieved from the first of the men to arrive and it was a nine- millimetre Norinko firearm. Its serial numbers had been obliterated. Nothing was found on the second man. After a search in the veld, a second firearm was found and its serial numbers had been obliterated.

[11] The two firearms were recorded into a Springs SAP 13 register by Inspector Greyling. Accused 1 and 3 were arrested and charged with the unlawful possession of a firearm. Mr Moswetsa testified that even though the incident had taken place a long time ago he could still point out to the appellant and accused 3 as the men arrested on the 12 April 1998. He denied the version of the accused when it was put in cross examination that no firearm was found in the possession of any of the two accused but, that it was community members who handed over the firearm to the police.

[12] According to Mr Greyling the arrests of the appellant and accused 3 occurred at Welgedag Road in the Springs area. After the accused were pointed out to them by the crowd. He and Mr Moswetsa gave chase as the accused were fleeing in different directions. They were assisted by the group with the arrest. After the arrest they searched the accused for firearms and none were found in their possession. However, the firearms were pointed out by the crowd in the veldt. About five to ten metres from where they stood with the

accused they found a one NZ 75 9 millimetre pistol with no serial number and it had one magazine with no bullets. The second firearm was a 9 millimetre Norinko pistol with one magazine and one bullet and its model number was 201C.

[13] The pistols were booked in at the Springs Police Station and he completed the register on 98/04/12 and registered them in an SAP 13 register on 249. The pistols were recorded under Springs case number 445/04/98. He did not recall if a gun residue test was done on the accused or if fingerprints were taken or uplifted from the firearms. In cross examination he denied Mr Moswetsa's version that he searched and found a firearm on one of the accused. He testified that it was Moswetsa who searched and found a firearm. He also denied the version of the accused who alleged that only one firearm was found which was brought to the police by the community members. He stated that at no time during the chase did he see any of the accused drop a firearm.

[14] Mr Madela was a witness called by the court. He was the investigating officer in the murder and robbery case. He testified that while investigating another case he came across a Springs case involving the appellant. He proceeded to Springs where the firearms in the Springs case were handed over to him on 27 May 1999. He delivered the firearms to the Forensic Laboratory in Springs under the Etwatwa MAS number 15/4/98. In cross examination he testified that he needed to fetch the firearms in the Springs Case in order to have them compared with the cartridges of the Etwatwa case number 09/02/1998 he had been investigating. He could not recall under which number the exhibits were handed in at the laboratory. In cross examination he explained that he obtained the firearms because of the three individuals being the accused before court, who were involved in connection with unlicensed firearms in Springs. It was pointed out to him that only two individuals were involved in the Springs case.

[15] The section 212 affidavit of Inspector Willie Morne Odendaal was admitted as an exhibit without objection. He stated that he examined one cartridge marked "B" received under reference LAB 6910/98 Etwatwa MAS 09/02/98. After conducting microscopic tests he found that the cartridge was fired from a 9 millimetre Parabellum Model NZ automatic pistol, which was received under LAB 19934/98 Etwatwa MAS 15/04/ 98.

[16] The appellant denied that he took part in the murder and robbery. He had no knowledge of the incident. He did not know the deceased or anyone going by the name Lombos. He testified that he had been awaiting trial on another matter when he was detained at the Modderbee Prison. He met Mr Sibiya after three days of his arrival there. He did not know him. The appellant testified that when accused 2 arrived at the prison he was already serving a term of imprisonment and had been moved to C MAX. He knew accused 2, they were friends and lived in the same area.

[17] In cross examination he testified that he did not know Mr Sibiya prior to their encounter in prison. He denied that Mr Sibiya had identified him amongst 70 or more prisoners. Mr Sibiya and his warden friends approached him in his cell three days after his arrest and arrival at the prison. They wanted to know his name and this was done on several occasions. They also asked if he knew certain individuals. He was also assaulted by them in his cell. They alleged he knew the people they were enquiring about. He reported the assault to the Magistrate but nothing was done about it. He had forgotten the names of the said warders involved in the assault. During 2002 he was charged with the present counts, which was about three years after his encounter with Mr Sibiya at Modderbee Prison.

[18] The issue to be determined is whether the identity of the appellant had been established and whether the State had proved its case beyond a reasonable doubt.

THE LAW

[19] It is trite law that the State bears the onus to prove the guilt of the accused beyond a reasonable doubt. The accused bears no such onus and, if his version is reasonably possibly true, he is entitled to receive the benefit of the doubt and has to be acquitted; *S v Van Der Meyden* 1999 (1) SACR 447 (W); *S v Shackell* 2001 (2) SACR 185 (SCA) at paragraph 30.

[20] It is also trite that a court of appeal has limited power to interfere with the findings of fact of a trial court and may only do so if there was demonstrable and material misdirection

by the trial court; *R v Dhlumayo and Another* 1948 (2) SA 677 (A); *S v Monyane and Others* 2008 SACR 543 (SCA) at paragraph 15.

[21] In the *locus classicus, S v Mthethwa* 1972 (3) SA 766 (A) at 768 A-C Holmes JA stated the following:

> "*Because of the fallibility of observation, evidence of identification is approached by the Court with some caution. It is not enough for the identifying witness to be honest; the reliability of observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight, the proximity of the witness, his opportunity of observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility scene; corroboration; suggestibility; the accused's face; built gait and dress; the result of identification parades, if any, and of course the evidence by or on behalf of the accused. This 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 light of the totality of the evidence and the probabilities; see cases such as R v Masemang 1950 (2) SA 488(AD); R v Dladla and Others, 1962 (1) SA 307(AD)at 310C; S v Mehlape 1963(2) SA 29(AD).*"

In *R v Masemang* 1950 (2) SA 488 at 493 the court held that:

> "*The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence.*"

In *S v Mehlape supra* at 32 G-H and 33 A, the court took cognizance of what was stated in *R v Shekelele and Another* 1953 (1) SA 636 (T) and quoted with approval in *R v Dladla And Others* 1962 (1) SA 307(AD):

> "*.....but in my opinion it is neither desirable nor possible precisely to define the type of question to be asked or factor to be investigated in all cases. The manner of removing any reasonable possibility of error in any given case is a matter entirely to*

be governed by the circumstances of the case. For example, it would usually be pointless to ask a witness who has identified a person whom he well knows to describe clothing or physical features or peculiarities; what is important is the opportunity he had of recognizing that person. In other circumstances such questions may be most pertinent. But what is always important in a case in which a witness says he knew the person he saw, is to test both any degree of prior acquaintance or knowledge claimed and the opportunity for a correct identification, having regard to the circumstances of the case; see the remarks of James J quoted with approval in the judgment of Holmes JA in R v Dladla and Others"

[22] It was contended by Mr Augustyn for the appellant that the identification of the appellant by Mr Sibiya, four months after the incident took place, was disputed especially where, according to the record he could not give particulars as to how he positively identified the appellant. Mr Mariot for the respondent contended that there was sufficient time for observation and identification of the appellant. This he said was corroborated by the independent informal identification at prison among the 70 prisoners and the recovery of the firearm which dispelled the suggestion that identification relied only on the evidence of a single witness. It was further contended that the appellant never provided a defence of an alibi.

[23] In my view, a court should always approach with caution the evidence of identity of a single witness, and not generalize as to what the actual evidence adduced was in order to confirm identity. The guidelines in *S v Mthethwa supra* were mentioned in order to alert our courts of the need to apply caution in matters of identity especially where such evidence is that of a single witness. Mr Sibiya testified that it was between 19:00 and 20:00 and that there were no street lights. On the aspect of visibility in his evidence in chief he responded as follows:

"Goed en hierdie was in the aand. Is daar enige beligting in die omgewing? Nee daar was geen;"

On the possible identity of those who were in possession of firearms the question was:

"Watter twee haal vuurwapens uit? – Ek is nie seker nie edelagbare omdat ons besig was om te gesels met my broer en toe die mense van elke kant ons genader het en by ons kom staan en ek kan nie met sekerheid se edelgabare watter van die vier mense het vuurwapens uitgehaal."

This same answer was given during cross examination when questioned on who of the four men arrived or approached first.

[24] Mr Sibiya refers to his attackers as "*hulle*". He was uncertain how the one who took his firearm was clad "*ek het nie opgelet nie edelagbare dit het so vining gebeur.*" It was only after he was prompted by a question from the State that he did a doc identification of the appellant, as the one who took his firearm and the one who was also in possession of a firearm on arrival where he stood with the deceased. He also identified accused 2 as the other person who was in possession of a firearm. Later Mr Sibiya testified that he could identify the appellant and accused 2 because it was not so dark and that he could see a person who stood in front of him, the appellant stood 2 metres from him and accused 2, 4 metres away.

[25] In my view, if it was slightly dark and where Mr Sibiya was certain of his identification, his dock identification should have been spontaneous and not prompted by a question from the prosecutor, more so in light of the fact that he testified that he also identified the appellant and accused 2 in prison. He should not have had any difficulty in cross examination in positively referring to his attackers as being the appellant and accused 2. Instead, he once more displayed uncertainty about who of the attackers in particular were in possession of the firearms apart from his own and, whom he saw firing the shots. He said it happened too quickly and that he did not see who fired the shots. Then he said the appellant fired a shot, but a few questions later he testified that he did not see who fired the shots.

[26] Where it concerns who robbed him of his firearm, one needs to take into account the surrounding circumstances, the poor visibility, the speed within which the incident took place, the fact that he had never known or seen the accused before the incident, whether he was able to positively and with assurance identify the accused. The answers Mr Sibiya gave

in cross examination were not evidence *per se* but, served to test the credibility of his evidence in chief and when evaluated by the court, should give assurance to the court that his identification of the accused could be relied upon.

[27] Counsel for the respondent contended that an informal identification of the appellant occurred when Mr Sibiya identified the appellant at prison amongst more than 70 prisoners. In my view, in order to give assurance, certain guarantees and fairness to the person identified, more than such a submission or, more that what was testified to by Mr Sibiya was required. In ordinary identification parades conducted by the police, participants are carefully selected according to height, age, appearances. These parades do not always guarantee that the correct suspect would be identified, even where a witness appeared to be certain that there was ample time to observe a suspect during the incident.

[28] Mr Sibiya testified that he did not recall the date on which this identification took place and that he just knew that the appellant was the one who robbed him of his firearm. To a repeated question whether he had immediately notified the police, in particular to the investigating officer, instead of answering the question, on two occasions he responded that he enquired only about his firearm. In my view a much more serious offence took place, which was the murder of his brother and the most reasonable reaction would have been to immediately report the matter to the police. Instead he was only interested in his firearm. He did not mention when it was that he reported his identification to the police.

[29] There is absolutely no basis for what I find to be stereotyping, in a finding that Mr Sibiya as a prison warder, who was exposed to working with many prisoners on a daily basis would find it easier to identify people by their facial features as was stated in the following lines where the learned magistrate proceeded to give a description of the appellant:

> *"Nou kyk die hof na die getuienis van Mnr Sibiya met betrekking tot die identifikasie van die beskuldigde dan is dit vir die hof opvallend dat Mr Sibiya 'n lid van die Korrektiewe Dienste wat op 'n daaglikse basis met 'n groot hoeveelheid mense werk Die hof sou dus verwag dat hy gewoond is aan verskillende gelaatstrekke....."*

Then the learned Magistrate proceeded to give her own description of the appellant in the following lines:

> *"Wat die voorkoms van die beskuldigde aanbetref is beskudigde 1 besonder of hy skep die indruk van besonder groot 'n postuur. Hy het 'n baie prominente en sterk gesig. Die voorval was vyf jaar gelede maar ten tye van die aflegging van die getuienis het hy onmiddelik die beskuldigde weer uitgewys."*

[30] Having dealt with the issue of identification, I now turn to the events of 12 April 1998 when the appellant and accused 2 were arrested. The appellant denies that he was identified while in the presence of more than 70 prisoners. His version is that he was approached by Mr Sibiya and his warder friends in his cell. He was assaulted and they wanted his name and information about other individuals. This also occurred in April 1998. Of importance is to consider whether the trial court properly considered the relevance of the firearms allegedly found on 12 April 1998 to the incident of 1 February 1998. The learned magistrate stated:

> *"Vir die doeleindes van die relevansie van daardie vuurwapens met betrekking tot hierdie saak voldoende dat een van daardie vuurwapens wel verbind word met die toneel waar die oorledene geskiet is. Die blote feit dat een van daardie vuurwapens verbind word met die doppies wat gevuur is waar die oorledene geskiet is, is dit vir die hof voldoende stawing vir die identifikasie van die persone wat teenwoording was ten tye van daardie voorval.*
> *Dit is hoogs onwaarskynlik dat Mnr Sibiya sou geweet het dat die twee beskuldigdes of beskuldigde voor die hof vandag dan spesifiek gearresteer was met betrekking tot 'n vuurwapen wat op daardie toneel gebruik was."*

[31] The above seems to rely on circumstantial evidence from which the inference of guilt was drawn. It is trite that the cardinal rules regarding inferential reasoning was stated in *R v Blom* 1939 AD 188 at 202 where the following was said:

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

[32] The question is, whether the facts relied upon for conviction and from which the inferences were drawn were proved beyond a reasonable doubt. In other words, in order to secure a conviction, the evidence adduced should pass the criteria and principles set out in *R v Blom supra.* Whether the appellant and accused 3 were found in possession of firearms used in the murder and robbery depends on the evidence of Mr Moswetsa and Mr Greyling. They differed on how the arrests of the appellant and accused 3 took place and they differed on the possession of the firearms and as to where the firearms were found on arrest. The appellant testified that the firearms were brought to the police by a group of people. No evidence was adduced from any other person from the group of people. The most important consideration is that no fingerprints were uplifted from the spent cartridges taken from the scene on 1 February 1998 and also from the firearms retrieved on 12 April 1998 and, no gun residue tests were done on the appellant and accused 3 on 12 April 1998. It had to be proved that there was physical control and possession of the firearms for an inference of guilt to be made. Accused 2 was not implicated in the firearm incident.

[33] On 25 May 1998 Inspector Motsepe examined the spent cartridges and found that they were fired from the same firearm. It is also during the latter month when Mr Sibiya identified the appellant as a perpetrator in the February 1998 incident. The appellant testified that, when he had an encounter with Mr Sibiya and his warder friends, he had not been imprisoned for the incident of 12 April 1998 and that he was moved from the Modderbee to C Max to serve a term of imprisonment on a different offence at the time accused 2 was detained at Modderbee.

[34] On 25 May 1999 Mr Madela, who was attached to the Etwatwa Police in Benoni

travelled to Springs Police Station where he took possession of the firearms booked in by Mr Greyling. This occurred more than a year after Mr Sibiya allegedly reported his identification of the appellant. Mr Greyling testified that the NZ 9 millimetre firearm had an empty magazine, meaning that no bullets were found in the firearm. Inspector Odendaal received a cartridge market "B" from the batch examined by Inspector Motsepe, however, cartridge "B" and the firearms were received by the laboratory under different Etwatwa MAS numbers 09/02/1998 and 15/04/98 respectively. Mr Greyling testified that a case was opened in respect of the firearms in Springs on 12 April 1998 with MAS 445/4/98 recorded in the Occurrence Book register.

[35] Inspector Odendaal opined that he examined cartridge B and found that it had been fired from the NZ 9 millimetre firearm. His findings at paragraph 4 are recorded as follows:

> "Bogenoemde resultaat is behaal op 'n wyse wat 'n bedrewenheid in sekere vertakkings van natuurkunde en Ballistiek vereis."

While there was no objection raised on behalf of the appellant to the handing in of Inspector Odendaal's affidavit, I find it to be lacking in explaining how he concluded that the cartridge was fired from the NZ 9 millimetre pistol, an explanation sufficient to satisfy the court and the accused as to how that conclusion was arrived at. In my view the evidence relating to the firearms should have been scrutinized by the court before relying on what I would deem to be the say so of the witnesses. An inference cannot be drawn that the firearms or one of them had been used in the murder and robbery.

[36] On considering the evidence as a whole, the state failed to prove its case beyond a reasonable doubt. It is my view the appeal against conviction and sentence should succeed and consequently the sentences imposed by the Regional Court, Gauteng must be set aside.

[37] In the result the following order is granted:

1. The appeal against conviction and sentence is upheld.

2. The sentences of 25 and 20 years imprisonment are set aside.

Tlhapi

TLHAPI VV

(JUDGE OF THE HIGH COURT)

I agree,

RAULINGA T J

(JUDGE OF THE HIGH COURT)

I agree,

Tlhapi

BASSON A C

(JUDGE OF THE HIGH COURT)