IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : GRAHAMSTOWN

CASE NO. CA & R 54/2012

In the matter between:

1. SIYABULELA MKHAZA
2. ASANDA MAPHURWANA

and

THE STATE

APPEAL JUDGMENT

GRIFFITHS, J.:

[1] The appellants in this matter were convicted by the regional magistrate, Port Elizabeth, of the following:

Count 1: Robbery with aggravating circumstances;

Count 2: Murder;

Count 3: Robbery with aggravating circumstances;

Count 4: Attempted murder;

Count 5: Robbery with aggravating circumstances.

Counts 1, 3 and 5 were all taken together for the purposes of sentence and each appellant was accordingly sentenced to 15 years imprisonment thereon. On Count 2, each appellant was sentenced to life imprisonment. On Count 4 they were each sentenced to eight years imprisonment, which sentence was to run concurrently with the sentence imposed on counts 1, 3 and 5.

[2] The appellants have come before this court on appeal as against both their convictions and sentences, having been duly granted leave in this regard by the court *a quo*.

[3] The State relied on the evidence of five witnesses including the complainants on counts 3, 4 and 5, one Mkontwana and one Ndaza. From their evidence it emerged that on the day in question, namely 13 September 2009, and at about 02H30 in the morning, Mkontwana and the deceased were on their way to a certain tavern. The deceased was wearing a white jacket, a blue Nike T-shirt, a pair of shorts and white Addidas takkies. Whilst en route they encountered two males. One of these males joined them and began walking with them whilst the other entered a nearby yard. The person who had entered the yard thereafter whistled. Shortly thereafter

another person appeared from premises which were ahead of them. This person, who turned out to be the first appellant, informed them that he intended to rob them and instructed them to search themselves. After they had done so, the first appellant searched them himself. From the deceased he took two earrings, from Ndaza some money and from Mkontwana, he took a belt. The other of the two males, who turned out to be the second appellant, assisted the first appellant in these actions.

[4] At a certain stage of these occurrences, Mkontwana managed to escape. He observed that the first appellant was wearing a black leather jacket and black Levi jeans. He was able to identify the appellants and described the first appellant as having had a brush cut hairstyle with a big nose and lips. He described the second appellant as being quite tall and light in complexion. The second appellant was wearing a brown zip up lumber jacket; puma track suit pants and black shoes.

[5] Ndaza testified that both of the appellants had knives in their possession. After Mkontwana had escaped, the appellants informed Ndaza and the deceased that they were going to kill them. The second appellant demanded the keys of the shop at which Ndaza worked. Ndaza responded that he did not have such keys in his possession. The second appellant then dragged him to the shop during the course of which Ndaza observed that the first appellant was, at the same time, dragging the deceased around the corner of a building. At this stage, the second appellant stabbed Ndaza and tripped him. After he had fallen, the second appellant continued to stab him until he lost consciousness. He regained consciousness the following day at hospital with stab wounds in his neck and chest.

[6] It was common cause that the first appellant had borrowed a black leather jacket that evening from one of the state witnesses, which he had worn during that evening as it was fairly cold.

[7] Both appellants were identified by Mkontwana who testified that there was a reasonable amount of light in the area emanating from certain "spray" lights, and other lighting in the area. He also testified that they had been in the company of the appellants for a fair amount of time that evening and that he had had sufficient time to observe them properly. On a later occasion he was taken to a certain house where he had seen the second appellant whom he pointed out to the police.

[8] Ndaza identified the second appellant as being one of the culprits but did not appear to be certain of the identity of the other person involved. He had come to know the second appellant as a person who had been a customer at his shop over a period of time. He had also attended a formal identification parade at which he had properly identified the second appellant. In this regard, the appellants' attorney, on their behalf, admitted that the identification parade had been properly and correctly carried out with all the necessary formalities.

[9] During the course of his evidence in chief he indicated that he had not seen the other person involved prior to that particular evening, and referred to him in evidence as "the other man". However, somewhat surprisingly, during the course of cross examination by the appellants' attorney, the "other man" was continually referred to as "the first appellant", with which

assertion Ndaza agreed.

[10] When the second appellant was arrested a few days later, he had in his possession the clothing referred to above which was seized by the police and later identified by these witnesses as having been the clothing which the second appellant had worn that evening. Indeed, the second appellant did not deny this and admitted that this was the clothing that he had worn during the evening in question. The arresting officer also testified that he found a knife in amongst the clothing which he seized from the second appellant.

[11] The same officer, Constable Mto, arrested the first appellant. On his arrest, the first appellant had certain earrings in his ears which were later identified by the deceased's sister as having been the property of the deceased which had been worn by the deceased on the night in question. He also found the aforementioned black leather jacket in the possession of the first appellant.

[12] During the course of his evidence, Constable Mto testified that the first appellant had, upon his arrest, confessed to his involvement in these matters and had led him to a certain building where he pointed out a bloodied jacket worn by the deceased. Because of his rank, such confession was clearly inadmissible in the proceedings before the regional court. In his heads of argument Mr. Solani, who appeared for the appellants, submitted that because the magistrate had not stopped this witness from testifying in this regard, this amounted to a misdirection. However, before us in argument, he abandoned this argument as it is clear that the magistrate, in his judgment, ruled that such evidence was inadmissible and had it, in effect,

struck from the record.

[13] Both appellants testified in their own defence. The gist of their version was that during the evening before the attack on the complainants and the deceased in the early hours of the morning, they had been at a friend's house smoking dagga. They had left there at approximately 11h00 and had returned home to sleep. The first appellant admitted that he knew the state witness, Ndaza, but the second appellant denied knowing him. The second appellant admitted that the aforementioned clothing was his but denied that Mto had found a knife in his jacket pocket. They both denied any involvement in these crimes.

[14] Based on the foregoing evidence the magistrate found that the identification of the appellants as the perpetrators of these misdeeds had been established beyond a reasonable doubt. Based on this, he appears to have found that the appellants had acted in concert and that they were thus both guilty of all the crimes charged on the basis of a common purpose.

[15] Mr. Solani contended that the magistrate was incorrect in finding that the appellants' identity had been established beyond a reasonable doubt. Mr. Els, who appeared for the state, contended otherwise.

[16] It seems to me that the following questions arise in this matter:

> Was the magistrate correct in finding that the appellants' identities had been established beyond a reasonable doubt? If so,

> Did the State establish beyond a reasonable doubt that one, or other, of the two appellants had in fact killed the deceased? If so,
>
> Did the State establish beyond a reasonable doubt that the appellant who did not inflict the wounds on the deceased which caused his death acted with a common purpose in the murder of the deceased?
>
> Did the state establish beyond a reasonable doubt that the first appellant acted in common purpose with the second appellant in attempting to murder Ndaza?

IDENTIFICATION:

[17] As far as the first appellant is concerned, the case against him rested on the evidence of a single witness who effected what amounted to a dock identification. In these circumstances it is clear that the court was enjoined to apply caution in approaching such evidence, not only because the conviction rested on the evidence of a single witness, but because that witness identified a person as being the perpetrator whom he had only seen once before, that being on the night when this incident occurred. In such circumstances, it is not sufficient for a court to be satisfied merely that the witness is an honest one; the reliability of his observations must also be tested taking into account a variety of factors[1]. Furthermore, generally

1 S v Mthetwa 1972 (3) SA 766 (A) 768

speaking a court should be additionally cautious with regard to a dock identification which has not been preceded by a properly held identification parade. The SCA has said in this regard:

> "In ordinary circumstances, a witness should be interrogated to ensure that the identification is not in error. Questions include –
>
> what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake."[2]

[18] As regards the second appellant, he was identified by both Mkontwana and Ndaza. In addition, Ndaza had attended upon a formal identification parade at which he pointed out the second appellant. Ndaza also knew the second appellant as being a customer at his shop and a schoolboy who had walked past his shop on a number of occasions.

[19] From his judgment, it is clear that the magistrate was alive to the fact that he was to approach this evidence with caution. He was satisfied that the two identifying witnesses were honest and in this regard there is nothing in the record to gainsay such conclusion. In fact, the contrary is true. On a reading of the evidence of these witnesses one gains the distinct impression that they were intent upon assisting the court in coming to a just conclusion.

2 S v Tandwa 2008(1) SACR 613 (SCA) at [129- 130]

For example, it is clear that when Mkontwana was asked to identify the perpetrators, he took some time in examining them and in ensuring that he was satisfied as to their identification.

[20] Furthermore, a full and proper investigation was conducted as to the reliability of both of these witnesses' evidence of identification. For example, evidence with regard to the lighting was led, the volatility of the situation, the time that the witnesses spent in the company of the perpetrators etc. In this regard, it seems that the evidence established that, particularly in the case of Mkontwana's identification of the first appellant, the witnesses had ample time to observe both the clothing and the features of the perpetrators so as to be able to identify them at a later stage.

[21] However the matter does not end there. With regard to the first appellant, Mkontwana testified that he was wearing a black leather jacket. He later identified this very jacket after the arresting officer had seized it from its owner who, in turn, testified that he had lent it to the first appellant that night prior to the incident. Furthermore, the above-mentioned earrings which the deceased had worn that night were found in the possession of the first appellant.

[22] As I have indicated, not only was the second appellant identified by both Mkontwana and Ndaza, the clothing which was described by Mkontwana as having been worn by the second appellant that evening was found by the arresting officer in the possession of the second appellant.

[23] The magistrate also pointed to a number of matters which lent further

support to the State's contention that it was indeed the appellants who had perpetrated these deeds. He pointed to the fact that both appellants were friends who lived in the same area near to one another. The appellants were, by their own admission, together during the evening prior to the time of the occurrences described by the State witnesses. The first appellant, after initially denying such, later admitted in evidence that he had been in the very street, namely Twebana street, where these incidents had occurred earlier that night. Finally, he pointed to the fact that the second appellant had denied any knowledge of Ndaza, but Ndaza testified that he knew the second appellant. On Ndaza's evidence the second appellant was aware that Ndaza worked at the shop. During the course of Ndaza's evidence he made mention of the fact that the second appellant had demanded the keys of that very shop. It is highly improbable that Ndaza could have fabricated this evidence.

[24] In view of all this evidence, I am satisfied that the magistrate correctly rejected the appellants' denial that they were involved and thus correctly rejected their alibi. I am satisfied that the evidence established beyond a reasonable doubt that both appellants were indeed involved in the events described by the State witnesses.

THE MURDER OF THE DECEASED:

[25] The evidence established that the first appellant was last seen in the early hours of the morning dragging the deceased around a certain corner.

The first appellant was also in possession of a knife. It is at this point that the second appellant was in the throes of attacking Ndaza and stabbing him. The State, for some unknown reason, failed to lead the evidence which was presumably available to it as to who found the deceased after he had been attacked, when he was found and where he was found. The only evidence available in this regard is that pertaining to the section 220 admissions made by the appellants, as read with the photographs of the scene where the deceased's body was found, and the key thereto. There is also evidence that the deceased suffered some 28 stab wounds penetrating his neck and chest.

[26] Based on this evidence, the question arises (as put to both counsel) as to whether or not the State established beyond a reasonable doubt that it was either of the appellants, or both, who committed the murder.

[27] There is little doubt that both appellants were intent upon robbing their victims. That much is clear from the appellants' actions earlier that evening when they took certain items from them. However, it appears that they were not content with this and proceeded to herd and drag their victims away from where they had initially found them. It seems furthermore that they were intent upon obtaining the keys to the shop, presumably in order to steal therefrom. On Ndaza denying that he had such keys in his possession, the second appellant proceeded to viciously stab him, no doubt, with the intent of killing him. The fact that Ndaza survived appears to be somewhat miraculous but indicates a course of conduct on the part of the appellants. In this regard, Mr. Els has submitted that the appellants were intent upon ensuring that the victims of the robberies would not live to tell the tale. There is some merit in this in that it appears they had searched their victims

and taken everything of value. In addition, the second appellant had been informed that Ndaza did not have the keys to the shop. It follows therefore that no further material advantage could be gained by detaining Ndaza and the deceased further. The only reasonable inference in these circumstances is that they were in fact intent upon disposing of them so as to prevent them from testifying against the appellants.

[28] From the photographs and key it does furthermore appear that the deceased's body was found in the vicinity of Tebwana street where the complainants and the deceased were robbed. The scene was attended by the photographer (according to the key) on the 13th of September 2009 at approximately 04h05, and was situated opposite house number 28375, NU 10, Motherwell, Port Elizabeth. The relevant points were indicated by one constable Soyamba at 04h05 on the same morning. As all this evidence was admitted, it collectively indicates that the body of the deceased must have been found within a period of 1 1/2 hours after the deceased and complainants were attacked at 02h30 that morning. It also indicates that the body was found in the same vicinity where the deceased was last seen being dragged by the first appellant.

[29] Based on all this evidence, I am satisfied that the magistrate was correct in accepting that the State established beyond a reasonable doubt that the first appellant murdered the deceased.

DID THE SECOND APPELLANT ACT IN COMMON PURPOSE WITH THE FIRST APPELLANT IN MURDERING THE DECEASED?

[30] The evidence in this regard is scant. There is no doubt, as indicated, that both appellants acted in common purpose with regard to all three robberies of the complainants and the deceased. However, when the first appellant dragged the deceased off and away from where the second appellant was attacking Ndaza, did the second appellant act in common purpose with him in killing the deceased?

[31] Mr. Els candidly conceded that he had some difficulty with this aspect. There is little doubt that on a balance of probability they did act in concert in this regard but was it established that this was so beyond a reasonable doubt? In my view it was not and the second appellant is accordingly entitled to the benefit of the doubt in this regard.

DID THE FIRST APPELLANT ACT IN COMMON PURPOSE WITH THE SECOND APPELLANT IN ATTEMPTING TO MURDER NDAZA?

[32] This stands on a very similar footing to the foregoing aspect. It is tempting to conclude that the first appellant did so act in concert but, once again, I do not believe that this aspect has been established beyond a reasonable doubt. Accordingly, the first appellant is entitled to the benefit of the doubt in this regard.

[33] It should be added that the magistrate did not deal at all with the last two questions in his judgment.

[34] It follows from the foregoing that I am satisfied as to the convictions on counts 1, 3 and 5. With regard to count 2, I am satisfied that the first appellant was properly convicted but not the second appellant. With regard to count 4, I am satisfied that the second appellant was properly convicted, but not the first appellant.

SENTENCE:

[35] With regard to counts 1, 2, 3 and 5, the magistrate found that no substantial and compelling circumstances existed, it being common cause that the provisions of section 51 of Act 105 of 1997 were of application. However, Mr. Solani argued that the provisions of that Act were not sufficiently explained by the magistrate to the appellants. It is so that the magistrate did not specifically call the appellants' attention to the provisions of the Act but such provisions were pertinently drawn to their attention in each of the relevant charge sheets. Furthermore, the appellants were represented by an apparently experienced legal practitioner. In the circumstances I am satisfied that such failure on the part of the magistrate did not amount to a misdirection[3].

[36] Mr. Solani has also argued that the magistrate ought in the circumstances to have found that substantial and compelling circumstances existed in this matter pursuant to the provisions of section 51(3) of that Act. He has submitted that the magistrate failed to properly take into account the ages of the appellants, their prospects of rehabilitation, the time that they spent in custody awaiting trial and the fact that both of them are first

3 See in this regard: S v Ndlovu 2003 (1) SACR 331 (SCA).

offenders.

[37] At the time when these offences were committed on 13 September 2009, the first appellant was 19 years of age, his date of birth being 9 August 1990. He had thus only just turned 19 years of age. The second appellant was 18 years of age, his date of birth being 22 August 1991. He had thus turned 18 a mere month before the 13th of September, 2009. Both appellants, and in particular the second appellant, had thus attained the age of majority shortly before this offence was committed.

[38] In respect of both appellants pre-sentencing reports were obtained. These revealed that both appellants had been brought up in somewhat challenged socio-economic circumstances, the second appellant perhaps more so than the first. Both appellants were school going at the time that these offences were committed, and both are first offenders. It does appear that, bearing in mind their ages and the comments by the probation officers, there is some prospect of rehabilitation.

[39] As against this, there is little doubt that these offences involved a considerable amount of gratuitous violence. The deceased and Ndaza were viciously attacked and stabbed after they had been robbed and at a time when it appears that there was absolutely no purpose in doing so, save perhaps to prevent possible detection.

[40] The Supreme Court of Appeal has stated the following with regard to youthful offenders:

> " However, in requiring a sentencing court to depart from the prescribed sentence in respect of offenders who have attained the age of 18 only if substantial and compelling circumstances justify this departure, the legislature has clearly intended that youthfulness no longer be regarded as per se a mitigating factor. So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption."[4]

[41] In Mabuza's case the Supreme Court of Appeal was dealing with appellants who were respectively 20, 19 and 18 years of age at the time that they committed the offences concerned.

[42] In my view, bearing in mind all the circumstances of this matter, the magistrate ought to have found that substantial and compelling circumstances exist. Indeed, Mr. Els, in his helpful argument whilst not conceding the existence of substantial and compelling circumstances, did concede that more emphasis ought to have been placed upon the ages of the appellants. Because of the disparity between a life sentence and that which this court intends to impose, which is striking, this court is entitled to

4 S v Mabuza and Others 2009 (2) SACR 435 at paragraph 23.

interfere with the sentences imposed by the magistrate.

[43] With regard to the robberies, it ought to be borne in mind that the actual robbing of the complainants and the deceased did not involve much in the way of violence. It was only subsequent to the robberies that the deceased and Ndaza were dragged away and ultimately viciously stabbed. The robberies themselves, whilst repugnant, pale to some extent when compared with the vicious murder of the deceased and the severe attack on Ndaza.

[44] The net effect of the sentences we are about to impose in substitution of those sentences set aside, bearing in mind that the second appellant's sentence of eight years imprisonment on count 4 will still remain but will not run concurrently with the sentences on counts 1, 3 and 5, is 25 years imprisonment in respect of the first appellant and 16 years imprisonment in respect of the second appellant.

[45] Accordingly, the following order is made:

1. **The second appellant's conviction and sentence on count 2 are set aside;**

2. **The first appellant's conviction and sentence on count 4 are set aside;**

3. **The first and second appellants' sentences on all the remaining counts are set aside and substituted with**

the following:

"ACCUSED 1

CT 1 : To undergo eight (8) years imprisonment;

CT 2 : To undergo twenty five (25) years imprisonment;

CT 3 : To undergo eight (8) years imprisonment;

CT 5 : To undergo eight (8) years imprisonment;

The sentences on counts 1, 3 and 5 are to run concurrently with one another and with count 2. The effective term of imprisonment in respect of accused no. 1 is twenty five (25) years imprisonment

ACCUSED 2

CT 1 : To undergo eight (8) years imprisonment;

CT 3 : To undergo eight (8) years imprisonment;

CT 4 : To undergo eight (8) years imprisonment;

CT 5 : To undergo eight (8) years Imprisonment;

The sentences on counts 1, 3 and 5 are to

run concurrently with one another. The effective term of imprisonment in respect of accused no. 2 is sixteen (16) years imprisonment.

4. Pursuant to the provisions of section 292 of the Criminal Procedure Act (No. 51 of 1977) the sentences imposed are antedated to 11 October 2011.

JUDGE OF THE HIGH COURT

BACELA, A.J. : I agree

ACTING JUDGE OF THE HIGH COURT

HEARD ON : 01 AUGUST 2012
DELIVERED ON : 23 AUGUST 2012