THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 167/12
Not reportable

In the matter between:

AZWIHANGWISI ROBERT MMBOI **FIRST APPELLANT**

ANDRIES NDISHAVHELAFHI MUDAU **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Azwihangwisi Mmboi v The State* (167/12) [2012] ZASCA 142 (28 September 2012).

Coram: **Mpati P, Ponnan, Mhlantla, Petse JJA and Erasmus AJA**
Heard: **6 September 2012**
Delivered: **28 September 2012**

Summary: Murder — common purpose — absence of proof of prior agreement — appellant a passive bystander — held, in the absence of conduct manifesting active association in killing, not liable for murder. Sentence — cumulative effect of sentences — concurrence of sentences — when appropriate — two sentences ordered to run concurrently.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Makgoba AJ sitting as court of first instance):

1 The appeal of the second appellant is allowed to the limited extent that the sentence imposed on count 2 (robbery) is ordered to run concurrently with the sentence imposed on count 1 (murder). The second appellant will thus serve an effective term of twenty years' imprisonment.

2 The effective term of twenty years' imprisonment shall run from 10 November 2004.

JUDGMENT

PETSE JA (Mpati P, Ponnan, Mhlantla JJA and Erasmus AJA concurring):

Introduction

[1] Arising out of an incident which occurred on 21 December 2003 at about 21h00 and at Lwamondo village in the district of Vuwani, Limpopo, the two appellants (together with a third accused who does not feature in this appeal) were tried in the Limpopo High Court, Thohoyandou on a charge of murder and robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977 (the Act). The indictment explicitly stated that the provisions of ss 51(1)(*a*) and 51(2) of the Criminial Law Amendment Act 105 of 1997 (the so-called minimum sentences legislation) applied respectively to the counts of murder and robbery.

[2] In its summary of substantial facts furnished in terms of s 144(3)(*a*) of the Act, the State alleged that the appellants, together with three other cohorts, planned to rob the deceased. In pursuance of that plan they followed the deceased after he had left the Bar Lounge, where he had been drinking with friends and accosted him. The first appellant tripped the deceased who fell to the ground. Joshua Nematundani who was accused 2 in the court below stabbed the deceased with a knife whilst demanding money from him, which the deceased did not have. He then robbed the deceased of his canvass shoes whilst three of their cohorts kept watch at a short distance from the scene of the robbery to ensure that their plan was effectively executed.

[3] The appellants were respectively accused numbers 1 and 5 at the trial. They were initially indicted together with three other persons, namely, Joshua Nematundani and to whom I shall henceforth refer as Joshua, Eric Dovhani Todani (accused 3) and Emmanuel Gundo Radzuma (accused 4). Charges were withdrawn against Todani and Radzuma before the commencement of the trial and both were subsequently called as State witnesses against the appellants.

[4] The high court convicted the appellants as charged and sentenced them to twenty years' imprisonment on the murder count and eighteen years' imprisonment on the robbery count. These sentences were not ordered to run concurrently. Thus the effective term of imprisonment in respect of each appellant is 38 years' imprisonment.

[5] Subsequently the high court granted the first appellant leave to appeal to this court against both his conviction and sentences whilst the second appellant was granted leave to appeal only against his sentences.

[6] The appeal was subsequently heard in this court on 6 September 2012. After hearing argument by counsel we made an order in terms of which the appeal of the first appellant was upheld and both his conviction and sentences

set aside. When making that order we indicated that our reasons therefor would be furnished later. The following are those reasons.

The facts

[7] It is necessary to sketch the circumstances of the commission of the crimes that led to the prosecution of the appellants in a little more detail.

[8] The State called several witnesses to support its case. Only the evidence of Todani and Radzuma is relevant for present purposes. Both were accomplices who were duly warned by the high court in terms of the provisions of s 204 of the Act. Todani testified that on 21 December 2003 he was at Tshivhumbe Bar Lounge drinking liquor together with six other persons, two of whom were the appellants. The second appellant suggested that the deceased be robbed because he had a lot of money; this he deduced from the fact that the deceased was drinking expensive liquor. When the Bar Lounge closed at about 21h00, all of the patrons left, including the deceased who left with three companions. Todani and his cohorts proceeded to follow the deceased. At a certain spot Joshua ordered the rest of his companions to stop, saying that he was going to take money and canvass shoes from the deceased. Joshua accosted the deceased and struck him with a beer bottle. Subsequently Todani heard the deceased saying that 'he [could] kill him because he did not have the money which he wanted.' Joshua then called upon the second appellant to lend him a knife whereupon he stabbed the deceased three times. Todani went on to testify that at all material times the first appellant was standing next to him together with Radzuma. After the robbery, Joshua left with the second appellant whilst Todani left for a different destination together with the first appellant and Radzuma.

[9] Radzuma testified that he was also at Tshivhumbe Bar Lounge together with the appellants, Todani, Joshua and two other men unknown to him. Joshua suggested that they 'should work with' the deceased which he understood to mean that the deceased 'should be assaulted'. When the bar closed, they left as

did the deceased together with the latter's companions. En-route they saw four people walking ahead of them. As they closed the gap between them and this group the first appellant approached the group and assaulted the deceased with a bottle. The deceased fell to the ground and the first appellant put his foot on the deceased's neck. Joshua joined the first appellant and demanded money from the deceased who said that he had none. Joshua called upon the second appellant to lend him his knife, who in turn obliged, and Joshua then stabbed the deceased twice in his upper body. The first appellant then intervened and told him to stop because the deceased had 'had enough', whereafter Joshua removed the deceased's canvass shoes. Upon being questioned by the court, Radzuma said that when he and his companions left the Bar he was not aware that the deceased would be confronted.

[10] The first appellant also testified in his own defence. It is, however, unnecessary to analyse his evidence in any great detail. In essence, the first appellant denied that he was a party to any agreement to rob the deceased. His evidence coincides, in material respects, with that of Todani more particularly on the aspect that whilst they were walking together Joshua instructed them to stop, separated from them and approached the group of four men of which the deceased was part. He further testified that Joshua came back and borrowed a knife from the second appellant and, armed with the knife from the latter, Joshua returned to where the deceased was. Soon thereafter the first appellant heard a person screaming saying that 'he did not have money'. After a while Joshua re-joined them holding a knife in his right hand and a pair of canvass shoes in his left hand.

[11] The high court concluded, on the strength of the evidence presented before it, that the guilt of the first appellant was established. In evaluating the evidence, the high court found that the evidence of Della Mulaudzi (the deceased's sister who testified on the condition the deceased was in when he returned home that fateful night) and Livhuwani Munwada who was with the

deceased when the latter was accosted but ran away, did not advance the State's case. It also recognised that the fate of the trial hinged on the evidence of Todani and Radzuma who were accomplices. It went on to say the following:

'Then the witness, Radzuma had an opportunity of observing what was the accused 1's participation, that he is the person who hit the deceased with a bottle, the person who, while the deceased had fallen down pressed him down with his leg or his knee and this witness happens to have been at a distance of about five to six metres away from the deceased and accused 1.

Hence I say that the two witnesses corroborate each other on material aspects. They are accomplices, they were at the scene, they know all that happened, especially the witness, Eric [Todani], who even conceded that he was part and parcel of the whole plan.'

Discussion

[12] I deal first with the first appellant. It is noteworthy that the indictment alleged that the first appellant and his cohorts acted in furtherance of a common purpose. Professor J M Burchell deals with the doctrine of common purpose in *Principles of Criminal Law* 3ed (2008) at 574. The learned author states that in essence the doctrine applies:

'Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design.'

[13] It is trite that the State bore the onus of proving the guilt of the first appellant beyond reasonable doubt. As it was held in *S v Van der Meyden* 1999 (2) SA 79 (W), which was approved and applied by this court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA), an accused is entitled to be acquitted if there exists a reasonable possibility that he might be innocent. In assessing whether or not the guilt of the accused has been established this court in *S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426e-h approved of the approach adopted in *Moshephi & others v R* (1980-1984) LAC 57 at 59F-H in which the following was

stated:

‘The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.’

[14] In this case the first appellant was convicted on the basis of the evidence of the accomplices. It is trite that when one deals with the evidence of an accomplice it is incumbent upon the trial court to properly evaluate such evidence. In *R v Ncanana* 1948 (4) SA 399 (A) at 405, Schreiner JA put it thus:

‘The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, . . . , of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, . . . The risk that he may be convicted wrongly although sec 285 has been satisfied will be reduced, . . . if there is corroboration implicating the accused. . . . [I]t will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of

the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question.'

[15] This theme was taken further by Holmes JA in *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440D-H where the following appears:

'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description ─ his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular *R v Ncanana*, 1948 (4) SA 399 (AD) at pp. 405-6; *R v Gumede*, 1949 (3) SA 749 (A.D) at p. 758; *R v Nqamtweni & another* 1959 (1) SA 894 (A.D) at pp 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.'

[16] In convicting the appellants the high court based its decision on its finding that a prior agreement between the appellants and their cohorts had been proved beyond reasonable doubt by the State. Moreover, the high court accepted the evidence of Radzuma without reservation and said that:

'. . . the witness Radzuma had an opportunity of observing what accused 1's participation was, that he is the person who hit the deceased with a bottle, the person who, while the deceased had fallen down pressed him down with his leg or his knee and this witness happens to have been at a distance of about five or six metres away from the deceased and accused 1.'

It went on to find that the two accomplices corroborated each other in material respects. However, a reading of the record reveals that Todani and Radzuma contradicted each other on the critical aspect of whether the first appellant had participated in the killing and robbery of the deceased. The State's case as to the existence of a prior agreement was entirely unsatisfactory given the inherent inconsistencies. In my view, therefore, the high court erred in finding that a prior agreement had been proved.

[17] In *S v Mgedezi & others* 1989 (1) SA 687 (A) this court said the following at 705I-706C:

'In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Sefatsa & others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

[18] In this matter counsel for the State readily conceded in this court that the existence of a prior agreement had not been proved by the State. Accordingly the conviction of the first appellant can be sustained only if the five prerequisites for criminal liability spelt out in *Mgedezi* are satisfied. On this score the dictum of the Constitutional Court in *Thebus & another v S*[1] 2003 (2) SACR 319 (CC) (para 45)

[1] Also reported in 2003 (6) SA 505; 2003 (10) BCLR 1100.

is instructive. The Constitutional Court said the following:

'A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other prerequisites of guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case.'

[19] Thus the fate of the trial with respect to the first appellant hinged on the cogency or otherwise of the evidence. Hence it has been reiterated time and again that the proper approach in evaluating evidence is to weigh up all the elements which point to the guilt of the accused as against those which are indicative of his innocence, taking cognisance of inherent strengths and weaknesses, probabilities and improbabilities and then decide whether the scales tilt so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.

[20] Accordingly, the question arose as to whether there was evidence of sufficient weight to sustain the conviction of the first appellant. To my mind the answer must be no. This is so for three principal reasons. First, of the two accomplices only Radzuma implicated the first appellant. Radzuma was thus a single witness whose testimony was contradicted on a crucial aspect by Todani (see eg *S v Sauls* 1981 (3) SA 172 (A) at 180). Secondly, Radzuma was an accomplice to whom the cautionary rule applied and thus the question whether or not the cautionary rule had been satisfied depended upon an appraisal of all the evidence. The contradictions and inconsistencies inherent in the State's case were, in my view, such that the high court ought to have entertained doubt as to the truthfulness of Radzuma's testimony. Thirdly, the testimony of the first appellant should not have been rejected merely because it was found to be improbable. It could be rejected only if it were found to be so improbable that it

could not reasonably possibly be true (see eg *S v Shackell* 2001 (4) SA 1 (SCA) para 30).

[21] Whilst we must accept that the first appellant was present at the scene of the crime it should be pointed out, however, that on a conspectus of all the evidence he did not manifest any conduct that could be said to have constituted active association with the killing of the deceased. On the contrary, his evidence, which cannot be rejected as false, and which was supported by Todani, establishes that he was merely a passive bystander. Quite clearly, therefore, his conviction is unsustainable.

[22] It was therefore for all the foregoing reasons that the appeal of the first appellant against his conviction was allowed and his conviction and the sentences were set aside.

[23] I now turn to the appeal of the second appellant against his sentence. As already mentioned in para 5 above, he was sentenced to twenty years' imprisonment for murder and eighteen years' imprisonment for robbery with aggravating circumstances. Counsel for the second appellant argued in his written heads of argument that the sentences imposed on the second appellant were disturbingly inappropriate and that the high court misdirected itself in its approach to sentence.

[24] At the outset it must be emphasised that the principle that applies with respect to an appeal against sentence is well-established. It is trite that sentencing is a matter pre-eminently within the discretion of the trial court and that a court of appeal will interfere with the exercise of such discretion only on limited grounds (see eg *S v Giannoulis* 1975 (4) SA 867 (A) at 868G-H; *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10).

[25] In *S v Malgas*[2] 2001 (2) SA 1222 (SCA) this court restated the test in these terms at para 12:

'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. Where material misdirection by the trial court vitiates its exercise of that discretion, the appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and 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", or "disturbingly inappropriate".'

[26] During his oral address counsel for the second appellant was constrained to concede that the sentences imposed by the high court, when viewed individually point to no discernible material misdirection. Nor could it be seriously contended that these sentences reveal a disparity of such a degree so as to render them 'shocking', 'startling' or 'disturbingly inappropriate'.

[27] To my mind counsel acted wisely in making this concession. It is plain from the judgments of our courts that crimes involving violence ─ as murder and robbery do ─ are always viewed in a serious light. Their gravity is, for example, reflected in a passage from the judgment of the Constitutional Court in *S v Makwanyane & another* 1995 (2) SACR 1 (CC) para 117:

'The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on

[2] Also reported in [2001] 3 All SA 220; 2001 (1) SACR 469.

those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his *amicus* brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law. . . .'

[28] It goes without saying that by their very nature murder and robbery are extremely serious crimes and the frequency with which they are committed is a matter of grave concern. Mr Thomu, counsel for the second appellant, nonetheless persisted in his argument that the high court should have mitigated the cumulative effect of the two sentences, given the circumstances in which the crimes for which he was convicted were committed, by directing a concurrence between the sentences of imprisonment imposed in respect of the murder and robbery convictions.

[29] On his part, counsel for the State readily conceded that the cumulative effect of the sentences is such as to justify interference on appeal. In my view, a cumulative sentence of 38 years' imprisonment for someone who was 19 years old when the crimes were committed, a factor acknowledged by the high court, is undoubtedly a heavy sentence. It suggests that the high court did not sufficiently consider the cumulative effect of the sentences on the second appellant given that the elements of the murder count were inextricably bound up with the elements of the robbery count. Accordingly the appeal of the second appellant

against sentence must succeed albeit only to the limited extent that his sentences will be ordered to run concurrently.

[30] Before concluding there are two other aspects that require mention. First, with respect to the first appellant's application for leave to appeal the high court, in the course of its judgment, said the following:

'. . . considering the fact that I have already decided to grant the applicants leave to appeal in respect of sentences I find it more convenient that I should also consider granting the first applicant leave to appeal on conviction, regard being had to the fact that in any event the appeal court is going to read the whole record and decide this case on appeal on the totality of the evidence.

No inconvenience will be caused whatsoever, and I find that it will be in the interest of justice that the appeal court be given the opportunity also to hear the first applicant's argument in respect of his conviction.'

[31] To my mind the implication of this statement is that the high court did not consider the proper test for leave to appeal, which is whether there is a reasonable prospect that 'another court might come to a different conclusion on appeal.' See eg *Rex v Baloi* 1949 (3) SA 523 (A) at 524; *S v Mabena & another* 2007 (1) SACR 482 (SCA) at 494e-f.

[32] Moreover, the high court appears to have been entirely oblivious to the existence of rule 10A(a)(ix) of the rules of this court[3] which requires of counsel to indicate which portions of the record are in their opinion necessary for the determination of the appeal. It is implicit in this rule that in the context of a criminal appeal it behoves the high court not to grant leave to appeal against conviction ─ simply because it is disposed to grant leave to appeal against sentence ─ where the envisaged appeal against conviction has no reasonable prospect of success, and is manifestly doomed to fail.

[3] The object of this rule was explained in, inter alia, *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (A) at 954H.

[33] Secondly, as already pointed out in para 2 above, the indictment explicitly stated that the State would, upon conviction of the accused, rely on the provisions of ss 51(1)(a) and 51(2) when it came to sentencing. Accordingly, as Marais JA made plain in *Malgas* (para 8) 'it was no longer business as usual. First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed sentence of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. . .'.

[34] It is beyond question in this case that the high court determined sentence without any regard for the provisions of ss 51(1)(a) and 51(2) of the minimum sentences legislation despite being statutorily obliged to do so. But the State, despite its declared intention foreshadowed in the indictment that it would invoke the provisions of the minimum sentences legislation upon conviction, did not cross-appeal against sentence on the grounds that the high court should have heeded the statutory prescripts bearing on sentence evidently because its attitude, manifested during the hearing of the appeal, was that the second appellant had, in any event, got his just desserts. Consequently it would be wrong for this court to now revisit that aspect. Nonetheless the glaring oversight of the high court in this regard is deprecated.

Order

[35] In the result the following order is made:

1 The appeal of the second appellant is allowed to the limited extent that the sentence imposed on count 2 (robbery) is ordered to run concurrently with the sentence imposed on count 1 (murder). The second appellant will thus serve an effective term of twenty years' imprisonment.

2 The effective term of twenty years' imprisonment shall run from 10 November 2004.

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X M PETSE
JUDGE OF APPEAL

Appearances:

First appellant:	S O Ravele Instructed by S O Ravele Attorneys, Thohoyandou Naudes, Bloemfontein
Second appellant:	A L Thomu Instructed by: Justice Centre, Thohoyandou Justice Centre, Bloemfontein
Respondent:	A I S Poodhun Instructed by: Director of Public Prosecutions, Thohoyandou Director of Public Prosecutions, Bloemfontein