THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 511/2012
Reportable

In the matter between:

VUYANI MASELANI **FIRST APPELLANT**

PATRICK MGESI **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Maselani v The State* (511/2012) [2013] ZASCA 21 (22 March 2013)

Coram: Mpati P, Tshiqi, Pillay, JJA, and Southwood and Swain AJJA

Heard: 8 March 2013

Delivered: 22 March 2013

Summary*:* **Criminal law – s 1 of act 51 of 1977 – robbery with aggravating circumstances – determination of whether grievous bodily harm has been established – consequences to the victim of the robbery is a relevant factor to be considered.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Koen AJ sitting as court of first instance):

The following order is made:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld and the sentence of 15 years' imprisonment imposed upon each of the appellants is set aside and replaced with the following:

'First appellant is sentenced to ten years' imprisonment.

Second appellant is sentenced to ten years' imprisonment.'

which sentences are, in terms of s 282 of the Criminal Procedure Act 51 of 1977, to run from the date of sentencing, being 29 July 2010.

JUDGMENT

SWAIN AJA (**MPATI P, TSHIQI, PILLAY JJA & SOUTHWOOD AJA** concurring):

[1] The appellants with the leave of the Western Cape High Court (Koen AJ) appeal against their convictions of robbery with aggravating circumstances and the sentences of 15 years' imprisonment which were imposed upon each of them.

[2] The first and second appellants stood trial as first and second accused respectively, and were convicted with a third accused, but at the stage of sentencing, the proceedings against the third accused were adjourned to allow

for a psychiatric examination to be conducted upon this accused, in terms of s 78(2) of The Criminal Procedure Act 51 of 1977 (the Act). The relevance of this issue will become apparent when dealing with the sentences imposed upon the appellants.

[3] The sole issue in regard to the appeals against conviction is whether as a question of fact, aggravating circumstances were present in the form of the infliction of 'grievous bodily harm' upon the victim of the robbery, within the meaning of that term as contained in s 1(*b*)(ii) of the Act. The section provides as follows:

'1 Definitions

(1) In this Act, unless the context otherwise indicates -

"**aggravating circumstances**", in relation to –

(a) …

(b) robbery or attempted robbery, means –

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.'

[4] The death of the victim of the robbery formed the basis of the murder charge against all three accused on which they were acquitted.

[5] The finding by the trial court that all three accused were party to a common purpose to rob was not challenged on appeal, and correctly so, as the evidence against all of them was overwhelming. According to the first appellant, all three accused arrived at the house where the victim was employed, looking for work. The first appellant stated that when they arrived at the house they knocked on the door, which was opened by the deceased and the second appellant asked if there was work for them. When the deceased replied there

was none, the first appellant asked the deceased for water. All three accused waited at the door whilst the deceased fetched the water. On her return, the deceased noticed that a cell phone which she had left at the door had disappeared and she asked where it was. All three accused initially denied knowledge of the cell phone and the deceased then said she was going to call the police. Accused 3 then admitted taking the cell phone, but refused to return it to the deceased. They asked the deceased for money for petrol and she answered that she had none. All three accused then decided the only way to get money was to rob the deceased. According to the first appellant all three accused held the deceased, who was struggling and proceeded to tie her up.

[6] The trial court correctly concluded that the first appellant was a truthful witness and that his evidence to the effect that all three of the accused participated in 'the suppression of the deceased by force before stealing from the premises' could be accepted.

[7] The crux of the argument advanced by counsel for the appellants, was that the medical evidence led by the State, as to the injuries sustained by the deceased, which culminated in her death, did not constitute the infliction of grievous bodily harm upon the deceased within the definition of 'aggravating circumstances'.

[8] Dr van de Hyde confirmed that the cause of death of the deceased was asphyxia caused by manual strangulation. She confirmed that severe force was not applied, because there was no fracture of the hyoid bones in the neck of the deceased, but that the force applied was moderate, because of the presence of haemorrhage.

[9] Counsel for the appellants submitted that for the purpose of determining whether grievous bodily harm had been inflicted, the inquiry was concerned solely with the 'nature, position and extent of the actual wounds and injuries' and the consequences stemming from the infliction of such wounds and injuries to the victim, was to be ignored.

[10] Support for this assertion, according to counsel for the appellants, was to be found in a dictum of Hoexter JA in *R v Jacobs* 1961 (1) SA 475 (A) at 478D.

'The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, and the intention of the accused is irrelevant in answering that question.'

Read in its proper context, the learned judge of appeal did not intend to limit the inquiry to the specified incidents of an attack upon a victim, but did so in order to emphasise that the intention of the attacker was irrelevant to the inquiry.

[11] That this is so is illustrated in *Jacobs* in the majority judgment of Van Winsen AJA with whose judgment Van Blerk JA concurred. Having pointed out that it is a question of fact whether aggravating circumstances are present in a particular case (at 481F), the learned acting judge of appeal expressed himself as follows at 485B-D:

'In deciding whether the Crown has proved the infliction of grievous bodily harm by the accused, the jury would, in my opinion, be entitled to have regard to the whole complex of objective factors involved in the accused's assault upon the deceased. It could take into consideration the shock which would inevitably result to the deceased by reason of the fact that the accused directed two blows at his face with a knife. It could have regard to the wounds resulting from the stabs in the face, their number, nature and seriousness, as well as to the two blows directed to the accused's stomach, their severity and the results which flowed from their infliction.'

[12] Counsel for the appellants submitted that these remarks were predicated solely upon the facts in *Jacobs* and were never intended to generally lay down what factors should be considered, in ascertaining whether grievous bodily harm had been inflicted. I disagree. It was made clear as a general proposition that the whole complex of objective factors, involved in the assault, are to be considered in deciding whether the infliction of grievous bodily harm had been established. This expressly included the 'results which flowed' from the wounds inflicted.

[13] Common sense dictates that where the object of the provision is to penalise 'the infliction of grievous bodily harm' upon a victim, the consequences suffered by the victim are a relevant consideration. As pointed out by the trial court, 'what harm can be more grievous than death'. This must be so where the victim dies as a result of the infliction of bodily harm.

[14] In addition, as pointed out by the trial court, if the harm suffered by the victim is excluded from consideration, absurd consequences could result where '…a mere threat to kill would result in a conviction with robbery by aggravating circumstances, but actual death would not if the degree or nature of the force applied in order to bring about the death could not be said to be grievous.'

[15] In the result, because the deceased died as a consequence of the injuries inflicted upon her neck, grievous bodily harm was established on the facts.

[16] By virtue of the provisions of s 1 of the Act, once a common purpose on the part of the accused to rob was proved and the infliction of grievous bodily harm upon the victim was established, then the offence of robbery with aggravating circumstances was proved against all three accused. In such a situation if it is uncertain which of the parties to the common purpose to rob, inflicted grievous bodily harm upon the victim, it matters not. It is not necessary to prove that this consequence was foreseen by the members to the common purpose to rob, provided it is established that one or other, or all of them, inflicted such harm. See *S v Dhlamini & another* 1974 (1) SA 90 (A) at 94B-D.

[17] The trial court found that according to the evidence of the appellants, accused 3 was alone with the deceased for a sufficient amount of time during which her death eventuated. However, because their evidence was not corroborated in accordance with the cautionary rule regarding evidence given by an accused, implicating a co-accused, the trial court held that it had not been established beyond a reasonable doubt that accused 3 had killed the deceased. The trial court also found that a common purpose to murder on the part of all

three accused was not proved. In the result all three accused were acquitted on the murder charge.

[18] Although the correctness of this conclusion is not before this court, it is necessary to examine the evidence of the appellants, implicating accused 3 in the murder of the deceased. This is so, because in order to properly consider the sentences imposed upon the appellants, a relevant issue is whether the evidence established any involvement by the appellants, in the infliction of grievous bodily harm upon the deceased, which resulted in her death. If accused 3 was solely responsible, then the moral blameworthiness of the appellants, in relation to the grievous bodily harm inflicted upon the deceased, was considerably less than that of accused 3. This was a factor which the trial court did not consider when passing sentence, as a result of the conclusion it reached on the murder charge.

[19] According to the first appellant, after they had subdued the deceased, accused 3 was asked to stay and guard the deceased, whilst the appellants went upstairs, to search for items to steal. Whilst upstairs, the first appellant stated that the second appellant, had called to accused 3 asking if the deceased was all right. Accused 3 replied that she was. Shortly thereafter, the first appellant saw children arriving at the home and he and the second appellant ran downstairs to make good their escape. The first appellant stated that he saw accused 3 holding the deceased and the second appellant then asked accused 3 why the deceased was not moving. Accused 3 replied that he was simply holding her. The appellants then carried the deceased and placed her upon a bed. They then tried to wake her, and when unable to do so they assumed she was unconscious. Accused 3, however, maintained that he had never entered the house at all. This was refuted by two of the state's witnesses, who saw three individuals approach and three individuals leave the house.

[20] The trial court, for the reasons set out in the judgment, correctly concluded that it had no hesitation in accepting the evidence of the first appellant and rejecting the evidence of the second appellant and accused 3

where their testimony conflicted with that of the first appellant. The trial court also correctly found that with due regard being had to the fact that the first appellant was a co-accused and his evidence therefore required careful scrutiny, the evidence of the first appellant was reliable and could be accepted as true.

[21] In contrast to this finding the trial court correctly found that the evidence of accused 3 that he remained in the vehicle and never entered the premises 'was obviously uncreditworthy and must be rejected' because of the evidence of the state witnesses.

[22] The trial court also made detailed findings on the demeanour of all of the accused. It found that with regard to the first appellant 'his demeanour was that of a remorseful person who had seen the error of his ways and had decided to tell the truth'. In contrast, the trial court found that the second appellant and accused 3 were 'less impressive witnesses' and each 'attempted to minimise his role in the events of that day and to point fingers at others'.

[23] On the first appellant's evidence only accused 3 could have strangled the deceased, whilst both appellants were upstairs. Indeed, accused 3 was the only one who had a motive to murder the deceased. The first appellant stated that when they arrived at the house, accused 3 had told them that he had worked there before. Accused 3 also told the deceased that he used to work at the premises. Accused 3 accordingly knew that the deceased would be able to tell the owners of the house, that one of her attackers claimed to have worked there before, which would possibly enable the police to trace him. For this reason accused 3 could not risk the survival of the deceased. However, the trial court, as pointed out above, concluded that because the evidence of the appellants implicating accused 3 in the murder of the deceased was not corroborated 'in any respect significant enough to outweigh the cautionary rule, and the risk of relying on the evidence of co-accused, we are not persuaded beyond reasonable doubt that it was accused 3 who killed the deceased'.

[24] Although corroboration of the evidence of an accused, which implicates a co-accused in the commission of an offence, is one of the recognised safeguards to reduce the risk of a wrong conviction, this is obviously not the only way in which this danger can be overcome. The absence of gainsaying evidence by the co-accused, or his mendacity as a witness, may, depending upon the facts, be regarded as a sufficient safeguard. Satisfaction of the cautionary rule does not necessarily warrant a conviction. What is required is proof beyond reasonable doubt and 'this depends upon an appraisal of all of the evidence and the degree of the safeguard aforementioned'. See *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440D-H.

[25] If it can be said that 'the accomplice is beyond all question a satisfactory and convincing witness while the accused is the opposite' then corroboration is not required. See *R v Mpompotshe & another* 1958 (4) SA 471 (A) at 476F-G. Similarly as pointed out by Schreiner ACJ in *Mpompotshe* at 476E-F:

'The cautionary rule does not require that the triers of fact should be told, or should warn themselves, that there must always be corroboration of the accomplice.'

[26] Having correctly found that the evidence of the first appellant was truthful and could be accepted, whereas the evidence of accused 3 could not, the trial court, in requiring corroboration of the first appellant's evidence implicating accused 3 in the murder of the deceased, misdirected itself. The evidence of the first appellant proved beyond a reasonable doubt that accused 3 had in fact murdered the deceased. The trial court accordingly erred in acquitting accused 3 on that charge. The evidence of the first appellant also established that the appellants played no part in the infliction of grievous bodily harm upon the deceased. That they were found guilty of this crime is solely as a consequence of the deeming provisions of s 1 of the Act.

[27] The trial court, in sentencing the appellants, referred to the approach formulated in *S v Malgas* 2001 (2) SA 1222 (SCA), which is to be followed when a court is faced with the task of sentencing an offender in terms of ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997. This court formulated the test

for when the prescribed sentence may be departed from in the following terms (para 25):

‘If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.’

[28] The trial court also referred to the decision of this court in S v Vilakazi 2009 (1) SACR 552 (SCA) in which this court held that (para 15):

‘It is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence’ and that the essence of the inquiry (para 18) ‘is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.’

[29] By virtue of the misdirection committed by the trial court, the absence of any involvement by the appellants in the death of the deceased, was not considered by the trial court when passing sentence. This in itself was a further misdirection. To sentence the appellants to the prescribed minimum of 15 years’ imprisonment, when due regard is paid to this factor, would result in the imposition of a disproportionate sentence. An additional circumstance of relevance is the sentence which was imposed upon accused 3. We were informed by counsel that accused 3 was sentenced to ten years’ imprisonment. The psychiatric investigation found that accused 3 suffered from mild intellectual disability. It would be unjust if accused 3, who caused the death of the deceased, received a lesser sentence than the appellants. Regard being had to all of the above, substantial and compelling circumstances exist for the imposition of a sentence less than the minimum prescribed sentence. A proportionate sentence in all of the circumstances to be imposed upon the appellants is that of ten years’ imprisonment.

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

1. The appeal against conviction is dismissed.

2. The appeal against sentence is upheld and the sentence of 15 years' imprisonment imposed upon each of the appellants is set aside and replaced with the following:

'First appellant is sentenced to ten years' imprisonment.

Second appellant is sentenced to ten years' imprisonment.'

which sentences are, in terms of s 282 of the Criminal Procedure Act 51 of 1977, to run from the date of sentencing, being 29 July 2010.

K G B SWAIN

ACTING JUDGE OF APPEAL

APPEARANCES:

FOR FIRST AND	M CALITZ
SECOND APPELLANTS:	LEGAL AID BOARD, CAPE TOWN
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FOR RESPONDENT:	R J VAN ROOYEN
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