THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 396/16

In the matter between:

DANIËL MAHLALELA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mahlalela v S* (396/16) [2016] ZASCA 181 (28 November 2016)

Coram: Shongwe, Van Der Merwe and Mocumie JJA and Dlodlo and Potterill AJJA

Heard: 3 November 2016

Delivered: 28 November 2016

Summary: Criminal Law – murder and robbery with aggravating circumstances: whether State proved beyond reasonable doubt that the appellant was one of three attackers who robbed and killed the deceased – circumstantial evidence: whether sufficient for a finding of guilty.

ORDER

On appeal from: Gauteng Provincial Division of the High Court, Pretoria (Smit J sitting as court of first instance, Circuit Court, Secunda):

1 The appeal is upheld.

2 The order of the court a quo is set aside (only in respect of the appellant) and substituted with the following:

'Accused 3 is found not guilty and discharged on all counts.'

JUDGMENT

Dlodlo AJA (Shongwe, Van Der Merwe and Mocumie JJA and Dlodlo and Potterill AJJA concurring):

[1] The appellant was charged with two other persons before the court a quo sitting at Secunda. The appellant was accused 3 in the proceedings before the court a quo. All three faced charges of murder, robbery with aggravating circumstances and possession of a firearm (a .22 revolver) with an unknown number of ammunition.

[2] On 1 November 2000 the appellant was convicted of murder and robbery with aggravating circumstances. He was sentenced to life imprisonment on the murder charge and 25 years' imprisonment on the robbery charge. The appellant unsuccessfully applied for leave to appeal against both conviction and sentence. The appeal against both conviction and sentence before us is with the leave of this court.

[3] The appellant pleaded not guilty to the charges preferred by the State against him. He did not disclose the basis of his defence as envisaged by s 115(2) of the Criminal Procedure Act 51 of 1977 (the CPA). He exercised his right to remain silent as enshrined in the Constitution. The prosecution called its witnesses and upon closure of its case an application for discharge in terms of s 174 of the CPA was made on the appellant's behalf. This was, however, dismissed by the court a quo. The appellant elected not to testify and closed his case. Counsel for the appellant contended that the State failed to prove beyond reasonable doubt that the appellant robbed and killed the deceased or that he acted in common purpose with the others to commit these offences. It was also submitted that the appellant was neither pointed out nor identified by the witnesses during the identification parade.

[4] It is common cause that the only direct evidence relied on by the State, concerning the involvement of the appellant in the offences charged, is that of Mr Mandla Boy Charlie Mabena (Mabena). The latter's evidence, as far as it concerns the appellant, is criticised and labelled as unsatisfactory by the appellant's counsel.

[5] In its heads of argument the State argued that the failure by the appellant to testify exposed him to what obtained in *S v Boesak* 2001 (1) SACR 1 (CC) para 24 where the Constitutional Court held as follows:

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is

evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman & another v Attorney-General, Transvaal*, when he said the following:

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'"

[6] The State also referred to *S v Alex Carriers (Pty) Ltd en 'n ander* 1985 (3) SA 79 (T). It was argued on behalf of the State, by Mr Nel, that at the end of the State's case it was prima facie proved by way of circumstantial evidence that (a) the appellant formed part of a discussion regarding the attack and robbery; (b) an approximate amount of R8 000 was robbed from the deceased; and (c) the appellant and accused 2 made deposits of R2 000 each into their respective bank accounts.

[7] Mr Nel was constrained to emphasise that the appellant and accused 2 each made deposits of R2 000 into their respective bank accounts on the same day at the

same bank and with the same teller. According to Mr Nel, because of the failure by the appellant to testify at the end of the State's case and explain the source of the money evident on the deposit slips, the prima facie case became proof beyond reasonable doubt that the appellant was complicit in the offences committed.

[8] I briefly recast the facts established by the evidence. It is common cause that one Stefaans Sifiso Mahlangu (Mahlangu) witnessed the shooting of the deceased and he saw two persons running away from the scene. One of these two persons carried a firearm. Mahlangu, in an identification parade, identified the two persons he had seen committing the crime as accused 1 and 2 respectively. It is common cause that two witnesses, Perley Sheila Klopper and Essak Natalwalla testified that there were in fact three persons involved in this matter. After shooting the deceased, one of the attackers snatched the money bag. It is common cause that the money bag contained R8 000 in cash and R10 000 in cheques.

[9] Mabena testified that while at Sporo's Shebeen together with his girlfriend and the appellant, accused 1 and 2 subsequently arrived there. A story was told to Mabena by accused 1 that a butchery was going to be robbed and that in the event of anyone resisting, accused 3 (the appellant) would produce a firearm and shoot that person. Mabena repeatedly made it clear that when the story was told to him he was not sure if the appellant and accused 2 were present. He stated that he thought they were outside. He added that he cannot remember clearly. When asked again if the appellant was present when accused 1 mentioned that it was the appellant that was going to do the shooting and if the appellant heard this, Mabena stated 'wat ek

nie goed onthou nie is het hy dit gesê toe hulle buitekant was of al binne. Ek kan dit nie goed onthou nie'. (What I do not remember is whether when he said that, they were outside or inside. I cannot remember well.)

[10] Strangely, the prosecution twisted the question and asked (seeing that the appellant was tasked with the shooting) what was his reaction on that aspect? Mabena responded 'hy het ingestem' (he agreed). Lastly, Mabena testified that in prison he was threatened by accused 1. The latter told him that if he was going to testify he must say that the man who shot the deceased was the appellant. It is common cause that accused 1 made a confession about his involvement, in which he made mention of the other participants. It is common cause that upon the arrest of the appellant, two bank deposit slips were found in his bedroom. These (as mentioned earlier) show a deposit of R2 000 each made into the accounts of the appellant and accused 2 respectively.

[11] It must be mentioned that concerning the appellant, the State presented no eye-witness evidence, no forensic evidence, nor any self-incriminating utterances in its attempt to link him to the crime of murder and robbery with aggravating circumstances. The State merely relied on Mabena's evidence as well as the two deposit slips found in the appellant's bedroom. This evidence was the sole basis upon which the State sought (and ultimately secured) the appellant's conviction. In Mabena's testimony there is one piece of evidence relied upon by the State. It consists of three words ie 'hy het ingestem' (he agreed).

[12] Mabena made it very clear in his evidence-in-chief that he could not confirm whether the appellant was present in the shebeen at the time when accused 1 narrated to him how the robbery of the butchery would be carried out. He repeatedly told the trial court that he was not certain if the appellant and accused 2 were present inside the shebeen when the discussion took place. I find the stance adopted by the prosecution not only wrong but also unfair both towards Mabena and the appellant. Having fully understood that the witness was not certain if the appellant was present in the discussion, it is unfair to ask the witness whether he could say for certain that the appellant was in agreement with the proposed plan to rob the deceased and shoot if necessary.

[13] It is highly improbable that a person who is, at the crucial time, outside and clearly not party to the discussion, would be able to agree to anything suggested. In my view this remains the unsatisfactory portion of Mabena's evidence. The above difficulties one has with Mabena's evidence were put to Mr Nel. He contended that although he was not going to place much reliance on Mabena's evidence, he would not concede its futility. In the interest of justice, Mabena's evidence that the appellant agreed to what was discussed must be discounted. No reliance can be placed on this portion of Mabena's evidence. Mabena was clearly led astray by the prosecution in saying that 'hy het ingestem'; which he again recanted when questioned by the court a quo.

[14] Following the submissions by Mr Nel, Mabena's evidence and the two deposit slips were used to provide circumstantial evidence from which the court was expected to draw the inference of guilt. It is trite that in cases based on circumstantial evidence the courts are enjoined to follow the judgment in *R v Blom* 1939 AD 188 at 202. The two 'cardinal rules of logic' relating to inferential reasoning in cases based on circumstantial evidence set out in *Blom* are:

'(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.'

[15] The difficulty is that proved facts envisaged in *Blom* are facts proved beyond reasonable doubt. Intermediate inferences, too, must be based on proved facts. Inferences may not be drawn from other inferences. See the article by Nicholas AJA in (E Khan (ed) *Fiat Iustitia Essays in memory of Olive Deneys OD Schreiner* (1983) at 312 (1983) 312).

[16] Simply put, circumstantial evidence provides a basis from which the fact in dispute can be inferred. The salient question to be answered is whether the appellant was guilty of the crimes committed beyond reasonable doubt. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence. I agree that where a prima facie case is proved against an accused person

in a case built and resting upon circumstantial evidence to which a reply from an accused would be expected, the fact that the accused elects not to reply may be a factor which, together with other factors in the case, leads to an inference of guilt. However, the weight to be attached to the accused's silence depends on the facts of the particular case. See *S v Letsoko* 1964 (4) SA 768 (A). It is settled law that there is no onus on the accused to prove his innocence. If an accused person remains silent, as in this case, the question remains whether the State proved the offence(s) charged beyond reasonable doubt.

[17] The appellant in this case may have taken the view that it is not necessary to reply to the State case because guilt cannot necessarily be inferred from the proven facts. See *R v Ismail* 1952 (1) SA 204 (A) at 210 and *Letsoko* at 776B-D. Silence cannot and must not be used to supplement the State's case where there is no evidence upon which a reasonable person would convict. See *S v Francis* 1991 (1) SACR 198 (A) at 203I.

[18] In *Boesak* the Constitutional Court having stated that an accused person who chooses to remain silent in the face of evidence calling for an answer, runs the risk that the court may well be entitled to conclude that the evidence is sufficient for a finding of guilt, warned that whether such a conclusion is justified will depend on the weight of the evidence.

[19] I am persuaded that the State did not prove beyond reasonable doubt that there was a factual basis entitling the trial court to draw inferences either intermediate or otherwise. The fact that two deposit slips evidencing the deposit of R2 000 each into the bank accounts of the appellant and accused 2 does not go far enough to assist the State. The discovery of these deposit slips hardly satisfies the first rule of logic in *Blom* at paragraph 14 above. There is a host of reasonable inferences to be drawn from the discovery of these deposit slips. The appellant may have been to the bank and accused 2 could have given him money and a deposit slip to bank for him as well, and he would get his stamped deposit slip later on. A third party may have done the banking for these two and returned the deposit slips to the appellant. There is no mystery in the fact that the deposit was done on the same date and with the same bank and presumably at the same teller. Of course this raises a suspicion. It does not follow, however, that the deposited money on that day into the accounts of the appellant and accused 2 belonged to the deceased, who was robbed of R8 000 in cash.

[20] If it were to be accepted that these deposit slips constitute a fact from which an inference of guilt can be drawn, that would stretch inferential reasoning too far. It bears restating that, for an inference to be permissible, it not only had to be based on proved facts, but also had to be the only reasonable inference from those facts, to the exclusion of all other reasonable inferences. The ultimate question is whether, in the light of all the evidence adduced at trial, the guilt of the appellant was established beyond reasonable doubt. See *S v Ramulifho* [2012] ZASCA 202; 2013 (1) SACR 388 (SCA) para 7; *S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426f-h. In deciding whether to convict or acquit an accused the court is obliged to adopt a

correct approach. In *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15 the court held that the correct approach is 'to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt'.

[21] Clearly, the trial court relied on the doctrine of common purpose in convicting the appellant of murder and robbery with aggravating circumstances. It is established law that for a finding of common purpose to be made, a number of evidential requirements have to be met by the State. Should any of these requirements not be satisfied beyond reasonable doubt, the prosecution fails. These requirements are authoritatively set out in *S v Mgedezi & others* 1989 (1) SA 687 (A) and need not be repeated.

[22] The trial court was under a duty to evaluate the evidence against the appellant separately and individually in order to determine whether each of the elements of the doctrine of common purpose had been proved by the State, beyond reasonable doubt. It also had a duty to evaluate the evidence against the appellant separately and individually to determine whether the State had proved beyond a reasonable doubt all of the elements of each offence charged. See *S v Jama & others* 1989 (3) SA 427 (A) 436I–J; *S v Thebus & another* 2003 (2) SACR 319 (CC) para 45; *S v Le Roux & others* 2010 (2) SACR 11 (SCA).

[23] I accept that a very strong suspicion was created against the appellant by the discovery of the two bank deposit slips. Suspicion remains a suspicion in our law. No person may be convicted on the basis of a suspicion, no matter how strong. I conclude that no factual foundation exists upon which the appellant's conviction could conceivably be sustained, either on the basis of inferential reasoning or on the basis of common purpose. In view of the conclusion I have reached, it is not necessary to deal with sentence.

[24] In the result, I make the following order:

1 The appeal is upheld.

2 The order of the court a quo is set aside (only in respect of the appellant) and substituted with the following:

'Accused 3 is found not guilty and discharged on all counts.'

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D V Dlodlo
Acting Judge of Appeal

APPEARANCES

For the Appellant:	L M Manzini Instructed by: Pretoria Justice Centre, Pretoria Bloemfontein Justice Centre, Bloemfontein
For the Respondent:	G C Nel Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein