REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 160 / 01

In the matter between

PIET STORK MONYANE	**FIRST APPELLANT**
SIMON NTOHROANE MOKOENA	**SECOND APPELLANT**
WONDER SIDNEY MTSHIXA	**THIRD APPELLANT**
PIETER NTSIZWA MOKOENA	**FOURTH APPELLANT**

and

THE STATE	**RESPONDENT**

Coram : **BRAND, LEWIS et PONNAN JJA**

Date of hearing : **14 NOVEMBER 2006**

Date of delivery : **23 NOVEMBER 2006**

SUMMARY

Appeal – generally – evaluation of evidence and trial court's findings.
Sentence – power of court on appeal to interfere.

Neutral citation: This judgment may be referred to as
Monyane and Others v The State **[2006] SCA 141 (RSA)**

J U D G M E N T

PONNAN JA

[1] The present three appellants were convicted in the Pretoria High Court (Borchers J, sitting with assessors) on two counts of murder. The fourth, the erstwhile first appellant, who has since died (I will continue for convenience to refer to him as the first appellant), was in addition to those two charges also convicted of contraventions of the Arms and Ammunitions Act 75 of 1969. Each was sentenced to imprisonment for a term of 25 years in respect of each of the murder counts. Ten years of the sentence in respect of the second count were ordered to run concurrently with the sentence on the first in respect of the second and fourth appellants, and 12 years of the sentence on the second count was ordered to run concurrently with the first in respect of the third appellant. The effective sentence was thus 40 years in respect of the former two and 38 years in respect of the latter. They appeal, with leave of the learned trial judge, against those convictions as well as the sentences imposed pursuant thereto.

[2] At approximately 5.05 pm on 6 June 1995, Mr Isaac Hlope was seated at the front door of his property, Plot 1 Linkholm, in Vanderbijlpark when he observed a white Toyota Corolla. The vehicle appeared to stall. The occupants, all men, who alighted from the vehicle, succeeded in restarting it. The vehicle travelled approximately 100 metres before coming to a halt in front of his gate. Once again, the occupants of the vehicle succeeded in restarting it. The vehicle then drove off in the direction of Plot 26. Thirty minutes later Hlope noticed the vehicle once again. This time it drove past his house in the opposite direction.

[3] The movements of that vehicle and its occupants during the intervening thirty minutes is to be found in the evidence of Agnes Tsoletsi and Anna Ramoletse. Agnes was making her way on foot in the company of 12 year old Anna to Plot 26, the home of Jacobus Frederick Pieter van Zyl and his wife Carolina, to purchase paraffin, when they noticed three men. Those three men preceded Agnes and Anna onto Plot 26. Agnes remained at the gate whilst Anna made her way with an empty

container and cash to the Van Zyl's kitchen door to acquire the paraffin. On her way to the kitchen door Anna passed one of the three men who had positioned himself about 32 paces from the gate. Although she took no particular notice of him she observed, as she later testified, that he was tall and light-skinned. From her vantage point, the other two men were no longer visible to Agnes. She thus assumed that they had entered the house. She did, however, have ample opportunity to observe the person who had remained outside. He was, according to her, dressed in a pair of red trousers and a skipper.

[4] As Anna approached the kitchen door she noticed a second person whom she described as a short, dark man. According to her, he had concealed himself so that he was not visible to Van Zyl. Van Zyl was then standing in the alcove of the kitchen door. The short, dark man advanced stealthily on Van Zyl who was then engaged in a conversation with the third of the group. What followed happened very quickly. The short, dark man produced a firearm and shot Van Zyl. Overcome by fear, Anna ran back to the gate where, without any explanation, she discarded the empty container and money and fled in the direction of her home. After retrieving the container and money, Agnes, believing that Anna had been unable to acquire the paraffin at the Van Zyls, made her way to Hlope's place with the intention of purchasing the paraffin there. On her way she was passed by the three men. She saw them approach a white sedan which was parked under some trees. As they approached the vehicle she heard them say 'Start! Start!'.

[5] It must have been at about that stage when Susanna Nel received a telephone call from her brother, Van Zyl. It was then 5.30 pm. She was able to fix the time with such precision by reference to a TV programme that had just commenced, which she viewed on a daily basis.

[6] Ben Mokwoena, who lived in between the homes of Isaac Hlope and the Van Zyl's, at Plot 20, was with one Nathaniel when he observed a stationary white vehicle. Three men, one of whom was wearing a pair of red trousers, came running

from Plot 26. As they ran past him and approached the vehicle they shouted 'Start! Start!'. The driver was unable to start the vehicle which had to be pushed before the engine ignited. The three men boarded the vehicle, which then drove off.

[7] Inspector Steyn was at his home, which is fairly close to Linkholm, when he received a report over his radio. In consequence of that report he drove to Linkholm. On his way he observed a white Toyota Corolla parked alongside the road. Three men were standing behind the vehicle. He took little notice of them and continued on his journey. About 100 metres from Plot 26 he received a report which caused him to turn his vehicle around. When he returned to the white Toyota Corolla some ten minutes later the vehicle was abandoned and its occupants had disappeared. He secured the vehicle which later had to be towed to the police station because its starter mechanism was damaged.

[8] Sergeant du Toit, a fingerprint expert, who examined the white Toyota Corolla at the police station, found certain prints on the bonnet of the vehicle as also on a beer bottle under the front passenger seat and the rear view mirror of the vehicle. All of those prints, according to him, were no older than two days.

[9] Ms van Zyl, the deceased in count two, died at the scene as a result of a gunshot wound. The bullet had entered her body behind her left ear and caused injury to her skull and brain. Mr van Zyl, the deceased on count one, died on 23 June 1995 as a result of multiple organ failure in consequence of gunshot wounds sustained by him to his abdomen on the day of the incident.

[10] It is obvious that the three men encountered by Agnes and Anna had gone to Plot 26 for some nefarious purpose. They had been conveyed there by a fourth person, the driver of the white Toyota Corolla. The light-skinned person in the red trousers had positioned himself as a sentry. It was his duty it would appear, to serve as a lookout. Whilst the third member of the group had engaged Van Zyl in a

conversation the short, dark-skinned person had initially concealed himself and thereafter with his firearm at the ready stealthily approached the doorway. The trio then fled as one, but not before both deceased had been dealt fatal injuries. At the ready was the fourth person, the driver, who had conveyed them to the scene and thereafter remained in the vehicle to facilitate a speedy getaway. He responded to their exhortation to start the vehicle. All four then sought to make good their escape in the white Toyota Corolla, which was ultimately abandoned some one-and-a-half kilometres from Plot 26 on account of mechanical failure.

[11] On those facts the inference that the group had acted in concert is inescapable. The trial court's conclusion to that effect, it must follow, cannot be assailed. It thus matters not who fired, in each instance, the fatal shot. Given the movements of the vehicle and of the three men as already alluded to, there was little, if any, time or opportunity for the composition of the group to have changed from the time the vehicle was first spotted by Hlope shortly after 5 pm until it was abandoned some thirty minutes later a distance of approximately one-and-a-half kilometres from the crime scene.

[12] It follows, on the facts outlined above, all of which were either common cause or undisputed, that each of those who were proved to be a member of that group fell to be convicted of the murders as charged. The only issue therefore that confronted the trial court was the identity of the members of the group. Appellants one, two and three testified during the trial. The fourth appellant did not.

[13] All of the appellants were arrested on 13 July 1995. The next day they appeared at an identification parade at which Anna identified the first appellant and Agnes the third appellant. In addition, it came to be admitted during the course of the trial that the palm prints found on the bonnet of the vehicle and the fingerprint on the beer bottle inside the vehicle belonged respectively to the first and second appellants. Furthermore, it also came to be admitted that the fourth appellant,

whose fingerprint, it should be added, was found on the rear view mirror, was the owner of the white Toyota Corolla.

[14] In short, there was thus incriminating evidence, either direct or circumstantial, which placed each of the appellants in Linkholm Park on the day of the incident. Those of the appellants who testified denied any involvement in the offences charged. The trial court delivered a careful and well-reasoned judgment. The evidence was fairly and accurately summarised in the judgment. Attention was given to the criticisms levelled at the evidence of each of the witnesses who testified for the State. The evidence of those witnesses was evaluated in the context of the entire body of evidence. After a comprehensive review of the evidence the learned trial Judge concluded that the evidence against the appellants was so compelling and the evidence of those appellants who testified so unimpressive that a conviction on each of the two counts of murder was justified.

[15] This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204e).

[16] The attack on the identifying witnesses is that they had an opportunity to see appellants one and three in advance when they were exhibited to them by the police at the crime scene on the day preceding the identification parade. Implicit in that rather bold proposition is the suggestion that Anna and Agnes who did not know the

appellants and had no quarrel with them had conspired together with each other and the police to falsely implicate some of them. That proposition is so far-fetched and fanciful that it was rightly rejected by the trial court. Furthermore, why, it must be asked, did the conspiracy extend to only two of the four suspects, each of whom, it must be added, was identified by a single witness? Surely a conspiracy, if there was one, would have aspired for more compelling and cogent incrimination.

[17] The trial court's primary findings of fact remain undisturbed — as indeed it must. The inference that each of the appellants was knowingly a party to a common purpose to kill the deceased is inescapable. That being the case it is perhaps unnecessary to discuss the evidence in any great detail. Ultimately, however, one draws comfort from the following additional features that the convictions were indeed justified. First, the evidence of appellant two, far from detracting from the state case actually bolsters it in certain material respects. He testified that on what can only be the day in question he travelled, from a stokvel which had been hosted by the first appellant, to his home, in the white Toyota Corolla which was then driven by the fourth appellant, whom he had met for the first time. To get the vehicle started when they left the stokvel at around 5 pm, the vehicle had to be pushed. *En route* the vehicle stalled on the Golden Highway. The fourth appellant advised him that he would get someone to assist to tow the vehicle. Both of them parted company. The second appellant made his way across the street and secured conveyance on a taxi.

[18] His evidence corroborates the state case not only to the extent that the vehicle stalled and had to be abandoned at the side of the road, but also that the fourth appellant and he were in the vehicle shortly after 5 pm on the day in question. He lied, however, in a rather inept manner as to where the car came to be abandoned. If, according to him, he was on an innocent sojourn, it is incomprehensible that both he and the fourth appellant would simply have abandoned the vehicle without first attempting to kick-start it as they had earlier done. The eagerness of both to put distance between themselves and the vehicle would only have manifested itself if they had indeed been involved, as the state suggests, in the unlawful attack on the deceased.

[19] Secondly, somewhat surprisingly the fourth appellant did not testify. The presence of his vehicle and the evidence of the second appellant linked him to the crime scene. In those circumstances, a reasonable expectation existed that if there was an explanation consistent with his innocence, it would have been proffered. He, however, refused to rise to the challenge. For him to have remained silent in the face of the evidence was nothing short of damning (*Osman and Another v Attorney General, Transvaa*l 1998 (4) SA 1224 (CC); 1998 (2) SACR 493 (CC); *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) SACR 1 (CC); *S v Thebus and Another* 2003 (6) SA 505 (CC); 2003 (2) SACR 319 (CC)). Moreover, if indeed the vehicle came to be innocently abandoned on the Golden Highway as the second appellant testified, it is surprising that the fourth appellant did not report the vehicle missing or cause any enquiries to be made to ascertain the whereabouts of what, undoubtedly for him, must have been a valuable asset. Even the most perfunctory enquiry would have revealed that the vehicle was in the possession of the police, and if minded to, he could easily have tracked it down. If innocent, that he did not do so is incomprehensible.

[20] Thirdly, the second and third appellants are friends who live in close proximity to each other. Both were arrested on 13 July 1995 at the home of the former. When questioned, at the time of their arrest, about the white Toyota Corolla they directed the police to the first appellant, who, according to them would have known where to find the fourth appellant, the owner of the vehicle. The first and third appellants were positively linked by eye witness testimony to the scene of the crime. The second and fourth appellants were linked, by the evidence of the former as also the finger print evidence and the latter's ownership, to the white Toyota Corolla. The evidence of several witnesses, as also, its proximity to Plot 26, when found abandoned, in turn, linked the white Toyota Corolla to the crime scene. The four appellants thus came to be linked by disparate pieces of evidence to the crime scene. That four individuals who were known to each other beforehand came to be linked to a crime scene some distance from their respective homes does more than merely excite suspicion: it leads irresistibly, in my view, to the conclusion that the venture was pre-planned.

[21] Approaching the matter holistically, as indeed one must, one is bound to conclude that the totality of the evidences excludes any doubt about the guilt of any one of the appellants. It follows that the appeal of the appellants against their convictions must therefore fail.

[22] As to sentence. The learned trial judge did not consider the appellants' crimes to be deserving of the custodial sentence of the utmost severity – life imprisonment. Nor, for that matter did she believe that they should be permanently removed from society. When sentenced in 2000 the appellants were in their mid to late twenties. Each had obtained a level of formal education of between standards five to seven. The second appellant, unlike the other two, both of whom had no dependants, was married with one young child. He had been convicted in 1991 of an armed robbery as well as the unlawful possession of a firearm and ammunition. The fourth appellant had been convicted in 1994 of the theft of a motor vehicle and was on parole when these offences were committed. The third appellant was the only one with an unblemished record, a consideration that received appropriate recognition in the lesser punishment meted out to him. All three had spent a period of three years in custody awaiting trial and each was convicted on the basis of dolus eventualis, the trial court having concluded that it was the first appellant who had shot and killed each of the deceased.

[23] It has not been suggested that the sentence was vitiated by any misdirection. The argument advanced on behalf of the appellants is that the degree of disparity between the sentence imposed and that which this court would have imposed is such that interference is competent and required. The crucial factor which allows for the applicability of that approach is the appellate court's being able to arrive at a definite view as to what sentence it would have imposed (*S v Matlala* 2003 (1) SACR 80 (SCA) para 10). In the present matter such a view, I believe, can be formed.

[24] By way of example, in the *Bull* case (see *S v Bull and Another; S v Chavulla and Others* 2001 (2) SACR 681 (SCA)) the two appellants had been convicted on two counts of murder, one count of robbery, one count of attempted robbery and one count each of the illegal possession of a firearm and ammunition. The charges all arose out of an attack on a bakery. The appellants were declared to be dangerous criminals and each was sentenced to imprisonment for an indefinite period. In terms of s 286(1)(*b*) the trial court directed that they again be brought before the court upon the expiration of a period of 35 years for the reconsideration of their sentences. The appellants were a 20-year-old first offender and a 21-year-old with previous convictions but no record of serious violence. This court set aside the sentence and imposed in its stead a sentence of 25 years' imprisonment on each appellant.

[25] In *Matlala*, the appellant had been convicted of murder, robbery with aggravating circumstances, unlawful possession of a firearm and ammunition. He was sentenced to 40 years', 15 years', three years' and one years' imprisonment respectively. The last three sentences were ordered to run concurrently with the sentence on the murder charge. The offences occurred in the course of an armed robbery. The appellant and two other men waylaid a shopkeeper as the latter was preparing to close his store. The shopkeeper who was shot three times died in hospital some two weeks later. The appellant then entered the shop carrying a firearm and held up the shopkeeper's assistant. He searched the premises for money eventually rifling the till of the cash register. He was then 25 years of age, the eldest of six children, all of whom were dependent on their mother for support. The appellant had been in temporary employment whilst at school but had been unemployed since then.

[26] After referring to *Bull's* case Howie JA stated (para 13):

'The present case is one of considerable gravity and demands a sentence of a similar order. I deliberately say "of a similar order" and not, "the same period" because, while courts, on the strength of experience and precedent, can closely enough assess cases as falling within a particular narrowed down range when a long term has to be imposed, opinions can, and indeed do, differ as to

quantification even within that limitation. But it would suffice for the required "definite view" that such range can be determined.'

[27] The differentiation of two years drawn by the trial court between the third appellant and the others was fully justified. His unblemished record was undoubtedly deserving of greater leniency and warranted recognition in the determination of an appropriate sentence. In my view, the range appropriate to this case that would be fitting punishment to impose upon the appellants is a sentence of 30 years' imprisonment in the case of appellants two and four; and 28 years' imprisonment in the case of appellant three. Plainly the difference between those sentences and that imposed by the trial court is sufficiently striking as to oblige interference.

[28] One final aspect requires comment. It does not appear from the record that the trial judge considered whether leave to appeal should have been granted to the full court. In terms of s 315(2)(*a*) of the Criminal Procedure Act 51 of 1977 when an application for leave to appeal in a criminal case heard by a single Judge is granted under s 316, the trial Judge shall, if satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal, direct that the appeal be heard by a full court. The present appeal is a case in which the trial judge should have been so satisfied. There were no questions of law involved; the case raised no question of principle; and there were no considerations which called for the attention of this court (*S v Myaka* 1993 (2) SACR 660 (A) at 661i-662b). It frequently happens that simple appeals have to be heard by this court. In order to avoid the unnecessary clogging of the roll of this court with matter that does not require its attention, it is important that trial judges should not overlook the provisions of s 315 (2) (*a*) (*S v Sinama* 1998 (1) SACR 255 (SCA)). The inappropriate granting of leave to appeal to this court results in cases of greater complexity and which are truly deserving of the attention of this court having to compete for a place on the court roll with a case which is not (*Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2003 (5) SA 354 (SCA) para 23).

[29] In the result the appeal against sentence succeeds. The sentence imposed by the trial court is set aside and the following is substituted in its place:

> 'Each of the three accused are sentenced to 25 years' imprisonment on each count. In the case of accused numbers 2 and 4, 20 years of the sentence on count 2 is ordered to run concurrently with the sentence on count 1 and in the case of accused number 3, 22 years of the sentence on count 2 is ordered to run concurrently with the sentence on count 1.'

V M PONNAN
JUDGE OF APPEAL

CONCUR:

BRAND JA
LEWIS JA