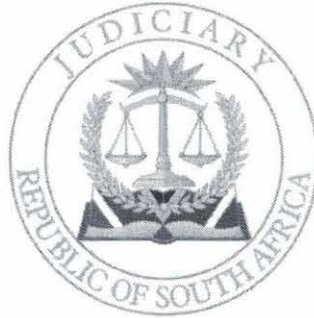


Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

**APPEAL CASE NO: CA66/2018
REGIONAL MAGISTRATES
CASE NO: RC 4/102/2016**

In the matter between:

KAGISO DANIEL SEDUMEDI

FIRST APPELLANT

TSHEPISO SOLOMON LETHOKO

SECOND APPELLANT

THULANI MEMANI

THIRD APPELLANT

MOJALEFA MESCHACK MOKONYANE

FOURTH APPELLANT

and

THE STATE

RESPONDENT

Coram:

Petersen J & Williams AJ

ORDER

On appeal from: The Regional Court Klerksdorp, North West Regional Division, (Regional Magistrate Melodi sitting as court of first instance):

The appeal against conviction by the first to fourth appellants is dismissed.

JUDGMENT

WILLIAMS AJ

Introduction

- [1] The appellants were tried in the Regional Court, Klerksdorp on a charge of murder. The charge was read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"). However, at the commencement of the trial the accused were warned of the provisions of sections 51(1) and (2) of the CLAA. The appellants, save for the first appellant, have been cited in a different chronological order in this appeal, to the order in which they were charged in the Regional Court. The second appellant was accused 3 in the court *a quo*; the third appellant was accused 4 and the fourth appellant was

accused 2. The evidence of the state witnesses therefore does not accord with the citation of the appellants in this Court. It would therefore be prudent, for ease of reference, when summarizing the evidence to cross reference the appellants in the order in which they were charged in the court *a quo*, to appreciate the evidence.

- [2] On 27 June 2017 the appellants pleaded not guilty and elected to remain silent. An application for discharge of the appellants in terms of section 174 of the Criminal Procedure Act 51 of 1977 ('the CPA'), at the close of the case for the prosecution, was refused. On 20 February 2018 the appellants were convicted of premeditated murder. On 08 March 2018, the appellants were sentenced to twenty-five (25) years imprisonment and were declared unfit to possess firearms.
- [3] The appellants were granted leave to appeal by the court *a quo* against their convictions only. Leave to appeal against sentence was refused. No petition against the refusal of leave to appeal against sentence was brought and the appeal before this Court is therefore only against conviction.
- [4] The two main grounds of appeal are very general in that the appellants contend that the trial court erred in accepting the evidence of the State and rejected their evidence; and found that they acted in the furtherance of a common purpose despite contradictions in the evidence of the state witnesses.

Factual Background

- [5] Petrus Chechile testified that during the early hours of the morning of 14 February 2016 he was with his two friends, the deceased and Tebogo Moremedi, at Oupa's Tavern/OGC ("the tavern") in Jouberton. Whilst sitting at the tavern they were warned that a gang called Dickies Lovers was on their way to the tavern. They immediately left as the Dickies Lovers were known for stabbing anyone. On their way from the tavern, they encountered three men. He recognized the men as Karnana, the first appellant (accused 1), Tshepiso, the second appellant (accused 3) and Thulani, the third appellant (accused 4). These three men shouted out that they were the boys they were looking for. He told Tebogo Moremedi and the deceased that they had to leave. After turning back and leaving, friends of the three appellants as aforesaid arrived. These men who arrived whistled for the three appellants. They joined the three appellants and started throwing stones at himself, Tebogo Moremedi and the deceased. They retaliated and threw stones back at them. Eventually the first, second and third appellants and their friends ("the group") left for the tavern. The deceased decided to follow them. As Mr Chechile and Tebogo Moremedi stood waiting for the deceased, he saw him some 10 to 12 metres from, running back in his direction with the group chasing him with knives some 4 to 5 metres behind him. The group had grown, and they were about 30 in number. This he could see as there were street lights. Mr Chechile and Tebogo Moremedi thereupon ran away. Some 20 to 30 minutes later, the deceased phoned him and told him where to find him. Mr Chechile and Tebogo Moremedi then proceeded to the

deceased where they found him at the gate of the house of one Matshipe.

- [6] The deceased was lying on the ground, and he was stabbed. Mr Chechile observed three stab wounds on the back of the deceased. As the deceased was weak, Mr Chechile and Tebogo Moremedi carried him by holding him under his shoulders. The same group emerged from behind them and once again threw stones at them. According to Mr Chechile, the four appellants (accused 1 to 4) were at the front of the group. The appellants were part of the Dickies Lovers gang. Mr Chechile and Tebogo Moremedi out of fear for the group, ran away once again and left the deceased, as the group caught up with them. As they ran away, he looked back when the deceased was screaming out to him and noticed the four appellants at the front of the group. The four appellants were at the back of the deceased at the time. The deceased also ran away.
- [7] Mr Chechile ran into a yard and the deceased entered an opposite yard. While he was hiding behind the house, he saw the group entering the yard where the appellant entered, with the four appellants still at the front of the group. They chased after the deceased wielding knives. He observed the four appellants attempting to stab the deceased but did not see who stabbed the deceased. He hid at the house where he ran to.
- [8] After some 30 minutes, he called Tebogo Moremedi who told him that he was with the deceased. He proceeded to where the deceased was

and found him lying on the ground. The deceased was stabbed and had already passed on. He observed many stab wounds on the chest of the deceased. He phoned his sister and requested her to phone the police.

- [9] They waited with the deceased until the police arrived. He supplied the names of the appellants to the police, save for the fourth appellant (accused 2) whose name he could not recall, as he knew them prior to the incident. He pointed out to the police where the appellants resided and when the police arrested the appellants, he was with the police. In fact, he had a pending case against the second appellant (accused 3). He knew all four of the appellants. The first and third appellants (accused 1 and 3) he knew from a gardening project that they did together at school. He attended the same school as the fourth appellant (accused 2) and used to play soccer with the second appellant (accused 3).
- [10] Tebogo Moremedi testified that the deceased was his friend. He knew all the appellants. He knew the first appellant (accused 1) by sight since they would greet each other when passing by. He attended the same school as the fourth appellant (accused 2) and would see him when in extension 17 when the fourth appellant (accused 2) visited his girlfriend. He only knew the second appellant (accused 3) and third appellant (accused 4) by sight when they walked together in groups. He only ever saw the third appellant (accused 4) once before this incident.

[11] During the early hours of the morning of 14 February 2016 he was with Petrus Chechile and the deceased at Oupa's Tavern. Whilst sitting there somebody came into the tavern and told them that the Dickies Lovers were on their way there. They stood up and immediately left. While they were walking, they saw the first appellant (accused 1), the second appellant (accused 3) and the third appellant (accused 4) who was part of the Dickies Lovers gang. The first, second and third appellants passed them. They stopped for a while and talked. The first, second and third appellants looked at them and started throwing stones at them. He knew that the third appellant (accused 4) had a grudge with the deceased as the deceased was a witness in a murder case against the third appellant (accused 4). They retaliated and threw stones back at first, second and third appellants. Other members of the Dickies Lovers gang arrived, and Messrs. Chechile and Moremedi and the deceased ran away. When they ran away the group of some 30 persons joined the first, second and third appellants and chased them. They managed to evade the group and the group proceeded to Oupa's Tavern.

[12] The deceased wanted to go back to Oupa's Tavern. Messrs. Moremedi and Chechile tried to stop the deceased from going back to the tavern, but the deceased did not want to listen. They followed the deceased back to the tavern and stood at the corner. As the deceased was some distance from the gate of the tavern, the four appellants came out of the tavern and stabbed the deceased with knives. According to Mr Moremedi this was the first time he saw the fourth appellant (accused 2). He could not tell who attacked the deceased first, but he could see

the appellants as there was a light where the deceased was standing and a light at the gate of the tavern.

[13] Mr Moremedi ran away while the deceased was being stabbed. As he was running away, he received a phone call from Mr Chechile and they proceeded to the deceased, where they found him hiding next to a fence. When they found the deceased, he was stabbed on the back, and he was weak. They picked him up and tried to take him home. While they were carrying the deceased the group appeared again and Messrs Moremedi and Chechile and the deceased ran in different directions. According to Mr Moremedi Mr Chechile phoned him whilst they were running away and suggested that they go back to find the deceased and to see whether he was still fine. They eventually proceeded to the deceased, where they found him dead. He had stab wounds on his neck and chest.

[14] The last time he saw the four appellants was when they stabbed the deceased when they emerged from the tavern gate. Messrs. Moremedi and Chechile waited for the police and an ambulance. Mr Moremedi maintained that he, the deceased and Mr Chechile were not gangsters.

[15] The appellants' version was a bare denial. They denied seeing the state witnesses and the deceased or attacking the deceased that day. The appellants confirmed that they knew each other and that they were members of the Dickies Lovers gang (a gang of some 80 to 100 members in Jouberton), although the third appellant (accused 4) only became a member of the gang when they were detained. The

appellants did not dispute that the state witnesses knew them or that Mr Chechile had a pending case of assault against the second appellant (accused 3), or that the deceased was a witness in a murder case against the third appellant (accused 4).

- [16] The first appellant (accused 1) and the second appellant (accused 3) testified that they were together on that day in the company of a certain Vuyo, Vuyane and Girly at Tjoba's Tavern and left at 02h00am in the morning when the Tavern closed. They had been to Oupa's Tavern between 20h00 and 21h00 the previous evening but stayed there for about 30 minutes as there were not many people at Oupa's Tavern. They disputed that they were ever with the fourth appellant (accused 2) and the third appellant (accused 4) on that day. The fourth appellant (accused 2) testified that he was at home with his partner and never went to Oupa's Tavern on that day. The third appellant (accused 4) testified that he was with his friend Sydney and they visited Oupa's tavern on that day but he did not see the deceased or Messrs. Chechile or Moremedi or any of his co-appellants there.

The test on appeal – conviction

- [17] The findings of fact and credibility by a trial court are presumed to be correct because it is that court and not the court of appeal which has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies.

[18] The accused deny that they were on the scene when the deceased was attacked or that they were part of the group that attacked the deceased. Each of the appellants raised an alibi defence in their own right. The trial court relied solely on the evidence of Messrs. Chechile and Moremedi to convict the appellants. This appeal implicates the reliability of the evidence of identification of Messrs. Chechile and Moremedi; and the alibi defence raised by the appellants.

[19] The assertion that the trial court ignored the fact that the duty remains with the state to prove the guilt of the accused beyond a reasonable doubt is without merit. The trial court was alive to the fact that the duty remains with the state to prove the guilt of the accused. The reference to relevant authorities and the application of those authorities to the merits of the case attests to this.

[20] The trial court was alive to the authorities on identification by reminding itself of the ratio in *S v Mthetwa* 1972 (3) AD 266 at 768 where it was said that:

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight. The proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused’s face, voice, build, gait, and dress, the result of identification parades, if any, and of course, the evidence by or on behalf of the accused. The list is not exhaustive.”

and

R v Dladla and Others 1962 (1) SA 307 (A) at 310 C-E, that:

“One of the factors which in our view are of the greatest importance in a case of identification is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. Even in the case when a witness has some difficulty in the witness-box in giving an accurate description of the facial characteristics and clothes of the person whom he has identified, the very fact that he knows him provides him with a picture of the person in the round which is a summary of all his observations of the person's physiognomy, physique and gait, and this fact will greatly heighten the probability of an accurate identification. In a case where the witness has known the person previously, questions of identification marks, of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.”

[21] In applying the decisions as aforesaid, the trial court found that Messrs. Chechile and Moremedi placed all four appellants at the scenes where the deceased was attacked. That the first time the deceased was stabbed, they left him with the four appellants who were, front and centre of the group. The second time the deceased was attacked he was pursued from the Tavern by the four appellants, chased into a certain yard and later found lying on the ground with multiple stab

wounds on his neck and chest. It was common cause between the state witnesses and the appellants that they were known to each other prior to the incident, with the appellants in some instances providing corroboration to the evidence of identification of the state witnesses. Messrs. Chechile and Moremedi testified that the appellants were members of the Dickies Lovers gang, which the appellants confirmed.

[22] The fact that Messrs. Chechile and Moremedi knew the appellants before the incident which the appellants conceded, makes it highly likely that they recognized them when they saw them that night. The fact that Messrs. Chechile and Moremedi forgot the names of some of the appellants when they made their statements does not take the matter further. Messrs. Chechile and Moremedi testified that they could see the appellants because there were streetlights and there was also light at the gate of the tavern. There was therefore sufficient lighting for them to see. There was also light inside the yard where the deceased was found lying. The injuries of the deceased were consistent with the evidence of Messrs. Chechile and Moremedi that the deceased was stabbed by a group of people with knives.

[23] The approach to the evaluation of alibi defence is that there is no onus on an accused to establish it. If it is reasonably true, then the accused must be acquitted. It must not be evaluated in isolation but in the totality of all the evidence and the court's impressions of the witness. See *R v Hlongwane* 1959 (3) SA 337 (AD) at 340H-341B).

[24] Whilst the trial court found that the appellants raised alibis but chose not to call any of the relevant witnesses, the burden remained on the state to disprove the alibis. The fact that the alibi witnesses were not called by the appellants did nothing to advance their own defence or to bolster the case for the State.

[25] The trial court further, correctly rejected the allegation that the witnesses had a motive to implicate the appellants. There was simply no basis for this general statement by the appellants. Instead, the appellants had all reason to harm Messrs. Chechile and Moremedi and the deceased. The deceased was a witness in a murder case against the third appellant (accused 4). Mr Chechile also had a case of assault pending against the second appellant (accused 3).

[26] The ground of appeal asserting that there were contradictions in the State's case which the trial court ignored, does not advance the appeal for the appellants. The trial court correctly found that the contradictions related only to the manner the incident unfolded and that it was not material to reject the evidence of Messrs. Chechile and Moremedi. The dictum in *S v Mafaladiso en Andere* 2003(1) SACR 583(SCA) 584-585 is apposite in this regard:

"It is "the repugnancy of his evidence" that discredits him, obviously the prior self-contradiction is not used assertively; i.e., we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately

conclude that he has erred in one or the other - but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one."

- [27] Messrs. Chechile and Moremedi placed the appellants at the respective scenes where the deceased was attacked. All four appellants, amongst others, attacked the deceased but there was no evidence as to who inflicted the fatal injuries. The trial court relied on active participation when it convicted the accused. To establish active participation, the following requirements enunciated in *S v Mgedezi and Others* [1989] 2 All SA 13 (A); 1989 (1) SA 687 (A) at 705I-706B must be proven:

"...he must have been present at the scene where the violence was being committed; he must have been aware of the assault; he must have intended to make common cause with those who were actually perpetrating the assault; 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; 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."

- [28] The finding by the trial court that the accused acted in furtherance of a common purpose to kill the deceased cannot be faulted and accordingly the appeal against conviction must fail.

Order

[29] In the result, the following order is made:

The appeal against conviction by the first to fourth appellants is dismissed.



Z WILLIAMS

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

I agree.



A H PETERSEN

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Appearances:

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Date heard: 28 November 2023

Date handed down: 28 February 2024