THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 640/16

In the matter between:

SYDWELL LANGA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Langa v The State* (640/16) [2017] ZASCA 2 (23 February 2017)

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

Heard: 3 November 2016

Delivered: 23 February 2017

Summary: Criminal Law: Appeal against convictions of murder and attempted murder: whether contradictions in State witnesses' evidence were material: whether denial of s 174 application was a fatal irregularity: whether s 309B of the Criminal Procedure Act 51 of 1977 was complied with: appeal against sentence: whether sentences should have been made to run concurrently

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ORDER

On appeal from: The Gauteng Local Division, Johannesburg (with Borchers J and Hattingh AJ concurring sitting as Court of Appeal) The appeal against the convictions and sentences is dismissed.

JUDGMENT

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

[1] On 17 June 1999 the appellant was found guilty on one count of murder and one count of attempted murder in the Regional Court, Soweto. He was sentenced to 10 years imprisonment on the murder conviction and four years imprisonment on the attempted murder conviction, with the sentences ordered not to run concurrently. The appellant lodged an appeal against the convictions and sentences in the Witwatersrand Local Division, but the appeal was dismissed. That judgment is not part of the record and despite onerous attempts could not be traced. The appellant then again approached the South Gauteng High Court for leave to appeal against the conviction and sentence to this court. The leave to appeal to this court was granted, hence the appeal before us.

[2] The State raised a point in *limine* that the record did not reflect that the appellant applied for leave to appeal to the trial court to prosecute the appeal to the High Court.

Leave to appeal from the trial court is a statutory requirement in terms of section 309B of the Criminal Procedure Act 51 of 1977 (CPA).[1] The State in argument conceded that

[1] S309 B(1) *(a)* Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any accused, other than a person referred to in the first proviso to section 309 (1) (a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.
[Para. (a) substituted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010) and by s. 11 of Act 42 of 2013 (wef 1 April 2010).]
(b) An application referred to in paragraph (a) must be made-
(i) within 14 days after the passing of the sentence or order following on the conviction; or
(ii) within such extended period as the court may on application and for good cause shown, allow.
(2)*(a)* Any application in terms of subsection (1) must be heard by the magistrate whose conviction, sentence or order is the subject of the prospective appeal (hereinafter referred to as the trial magistrate) or, if the trial magistrate is not available, by any other magistrate of the court concerned, to whom it is assigned for hearing.
(b) If the application is to be heard by a magistrate, other than the trial magistrate, the clerk of the court must submit a copy of the record of the proceedings before the trial magistrate to the magistrate hearing the application: Provided that where the accused was legally represented at a trial in a regional court the clerk of the court must, subject to paragraph (c), only submit a copy of the judgment of the trial magistrate, including the reasons for the conviction, sentence or order in respect of which the appeal is sought to be noted to the magistrate hearing the application.
(c) The magistrate referred to in the proviso to paragraph (b) may, if he or she deems it necessary in order to decide the application, request the full record of the proceedings before the trial magistrate.
(d) Notice of the date fixed for the hearing of the application must be given to the Director of Public Prosecutions concerned, or to a person designated thereto by him or her, and the accused.
(3)*(a)* Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal.
(b) If the accused applies orally for such leave immediately after the passing of the sentence or order, he or she must state such grounds, which must be recorded and form part of the record.
(4)*(a)* If an application for leave to appeal under subsection (1) is granted, the clerk of the court must, in accordance with the rules of the court, transmit copies of the record and of all relevant documents to the registrar of the High Court concerned: Provided that instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the High Court concerned may nevertheless call for the production of the whole record.
(b) If any application referred to in this section is refused, the magistrate must immediately record his or her reasons for such refusal.
(5)*(a)* An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.
(b) An application for further evidence must be supported by an affidavit stating that-
(i) further evidence which would presumably be accepted as true, is available;
(ii) if accepted the evidence could reasonably lead to a different decision or order; and
(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
(c) The court granting an application for further evidence must-
(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.
(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.

it must be assumed that the trial court had denied leave to appeal and that the appeal was properly before the court a quo. This assumption was fortified by the written reasons given by the magistrate in the record, which are required of an appellant to obtain prior to the lodging of an appeal to the High Court. This conceded point in *limine* accordingly needs no further consideration.

[3] The appellant argued that the magistrate committed a fatal irregularity in refusing to hear the appellant's application for discharge at the end of the State's case. Counsel for the appellant conceded that this argument could only be relevant if the argument on the merits was upheld. From what follows this argument must be rejected. Also, because the State had put up a prima facie case, despite the contradictions. Furthermore this appellant had ample opportunity to apply for discharge in terms of s174 of the CPA at the same time as his co- accused did so.

[4] The crux of the appeal revolves around whether the appellant committed the crimes. It was submitted on behalf of the appellant, that the identification evidence of the State witnesses was contradictory, unreliable and that the court a quo only paid lip service to the cautionary rules pertaining to identification. However, it is common cause that the appellant was present at the time of the shooting and that there had been an altercation between him and the deceased prior to the shooting. Thus, identification is not the issue, but rather, whether the appellant was correctly found to be the perpetrator of these offences.

[5] On 20 April 1997 at Joe's tavern in Meadowlands Mr Wilson Mofokane tragically lost his life due to multiple gunshot wounds and Mr Smangilso Simelane (Simelane) was wounded on his right arm. Simelane testified that he did not know the appellant and that he did not know whether or not the appellant was the shooter. It had been dark where the shooter was standing. He therefore could not identify the shooter at the identification parade.

[6] Mr Khutsoane (Khutsoane) testified that he recognised the appellant in the dock from the incident, but did not know him prior to the incident. He did not attend an identification parade. He testified that the lighting had been sufficient for him to see the shooter. The shooter was wearing a cap and a brown leather jacket. Khutsoane saw the appellant shooting in the direction of where the deceased was standing. He could see that the fire-arm being used was an automatic nine millimetre pistol. He had the opportunity to observe the shooter because he was immobilised due to shock and he was sober. Furthermore he did not immediately run away when the shooting started because he could only walk with crutches and his crutches were lying on the ground. He maintained that he saw the appellant shooting more than one shot. Although not mentioned in his statement, he testified that he saw the shebeen owner wrestling with the appellant during the shooting in an attempt to gain possession of the firearm.

[7] Mr Letsolo (Letsolo), the shebeen owner, testified that he had been called because there was fighting in the shebeen. He saw the deceased and a person called Sue fighting and he and his patrons succeeded in separating the deceased and Sue. He in that period also had to calm the appellant down and while doing so Sue walked away. Later on the appellant was in the company of Sue. After some minutes he heard gunshots and he walked to the direction of the sound. As he entered the passage between the main house and room from which the shebeen was operated he encountered the appellant in this passage with a firearm in his hand, shooting randomly. Mr Letsolo and his girlfriend took the firearm from the appellant but the fire-arm was by then empty of bullets. This witness could not recall that he had seen the appellant prior to that evening. This witness identified the appellant at an identification parade.

[8] The appellant confirmed wearing a brown leather jacket and a cap, as had been testified to by Khutsoane as being the clothing worn by the shooter. The appellant confirmed that he was identified as the perpetrator of the crimes at an identification parade by Letsolo. It was never specifically put to Letsolo that the reason why he implicated the appellant was that some problems had arisen between them in 1990 when the appellant, aged nine, had worked at Letsolo's salon some nine years prior to

this shooting. There is no reason for the witness to deny that he knew the appellant; that is if he could recall him from nine years ago, as a nine year old child. This evidence was never put to the witness and only surfaced in the appellant's evidence, presumably, to provide a motive for this witness identifying the appellant as the perpetrator.

[9] The appellant's version was that his unnamed friend had fired two warning shots to save the appellant from being attacked by seven people. The appellant testified that he did not shoot at all. He conceded that the shebeen owner tried to calm him down once, and that the person he fought with might have been the deceased.

[10] Khutsoane was in close proximity of the shooter, at just over a metre away. Letsolo corroborated his version that there was sufficient lighting to see the shooter. Mr Khutsoane gave cogent reasons as to why he had ample opportunity to observe the shooter, in that he was looking at him directly, could see him and had time to observe his clothing as well as the type of firearm he had in his hand. He could not run away when the shooting started because he had to retrieve his crutches and was thus observing the shooter. He was sober and shocked into watching. The immobility of Khutsoane rendered credibility to his detailed observation of the appellant as the shooter. Letsolo saw the appellant shooting and wrestling with the appellant for the firearm. He identified the appellant as the perpetrator at an identification parade. He was an independent witness with no involvement in the altercations; his only concern was the safety of his patrons.

[11] The contradictions in the versions of the State witnesses' were not material. It is immaterial whether there had been one or two altercations prior to the shooting. It is common cause that there was an altercation to such an extent that the shebeen owner was called to intervene, which he did. In any event Letsolo testified that he did not see the first altercation as he was only called thereafter. In ascertaining who pulled the trigger it is immaterial to determine who assisted in the breaking up of the altercation.[2] Whether the shooting took place in the passage between the house and the shebeen or

[2] *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 594 c-d

in the yard of the shebeen is also not material to who was shooting. Letsolo testified that a photo reflected that the bullet from the first shot made an impact on the outside room's window but was blocked by the burglar bars. The other shots hit the deceased and Simelane while another bullet hit the outside wall of the room from where the shebeen is run. What is clear is that shots were fired within the perimeters of Letsolo's premises and not outside the premises, as put to the witnesses on behalf of appellant. The mere fact that the witnesses' observations did not in all aspects coincide does not render their versions untruthful or unreliable. The test is whether the truth was told, despite any shortcomings. The trial court evaluated the evidence as a whole and correctly found the State had proved its case beyond reasonable doubt.[3] The appeal against the convictions ought to be dismissed.

[12] It was conceded on behalf of the appellant that the appeal ground that the court a quo, when considering sentence, should have considered the fact that the appellant was standing trial on another matter, despite it not being finalised, was fatally flawed. The fact that ex post facto it is known that the appellant had in the matter, when finalised, been sentenced to 33 years' imprisonment, could be raised on appeal as a point of appeal in that matter and not in the matter before us.

[13] The only other ground of appeal against sentence is that the sentences should have been ordered to run concurrently because the two offences were closely connected in space and time. Section 280(2) of the CPA provides a sentencing court with the discretion to make an order that sentences run concurrently. A court of appeal can only interfere with the exercise of that discretion if it is satisfied that the sentencing court misdirected itself or did not exercise its discretion judicially. Absent such proof, this court has no right to interfere with the exercise of the discretion of the court a quo.[4]

[14] The court a quo did not provide reasons as to why the sentences were not ordered to run concurrently. It is correct that the offences where closely linked in time

[3] *S v Bruiners en 'n ander* 1998 (2) SACR 432 (SE); *S v Safatsa and others* 1988 (1) SA 868 (A).
[4] *S v Mokela* [2011] ZASCA;2012011) SACR 431 (SCA) para 10

and space, however the appellant was randomly shooting at patrons in the shebeen in an attempt to kill the deceased execution style. The appellant thus intended not only to shoot the deceased, but foresaw that by randomly shooting in the shebeen, he could kill other patrons. The appellant was thus not punished twice for the same actions and therefore the court a quo did not misdirect itself in not ordering that the sentences run concurrently. The cumulative effect of 14 years imprisonment for murder and attempted murder is not disturbingly inappropriate or disproportionate to the offences, the needs of society or the personal circumstances of the appellant. The sentence of 14 years imprisonment is not such that no reasonable court would have imposed the sentence. The trial court therefore did not exercise its discretion unreasonably, it did so judicially and there are no grounds justifying interference with the sentence on appeal.

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

The appeal against the convictions and sentences is dismissed.

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S Potterill
Acting Judge of Appeal

APPEARANCES:

For the Appellant:	H L Alberts
Instructed by:	Johannesburg Justice Centre, Johannesburg
	Bloemfontein Justice Centre, Bloemfontein
For the Respondent:	S H Rubin
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein