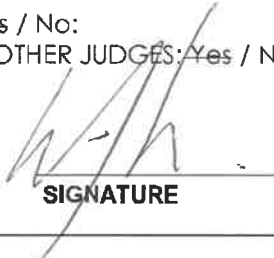


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**



Appeal No.: A11/2019

(1)	REPORTABLE: Yes / No:
(2)	OF INTEREST TO OTHER JUDGES: Yes / No
(3)	REVISED.
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DATE	SIGNATURE

DPP Ref No:10/2/5/1(2019/011)

Date of Appeal: 27 February 2023

In the matter between:

MOSWEUNYANA, POLOKO DIRYANA

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Mosweunyane Poloko Diranya v The State* (A11/2019) [2023] ZAGPJHC 554 (23 May 2023)

JUDGMENT

Karam AJ: (Bhoola AJ concurring)

INTRODUCTION

1. The appellant was convicted in the Protea Regional Court on two counts of murder, read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the minimum sentence legislation").
2. He was sentenced on each count to life imprisonment.
3. The matter comes before this court as an automatic appeal, by virtue of the sentence imposed.

THE EVIDENCE

4. Thabo Makwanyana testified that at approximately 21h00 on 19 December 2015 he arrived at Chico's tavern and encountered the two deceased who were seated together. At approximately 22h00 or 23h00, and whilst the witness was seated with them inside the tavern, five men arrived. Of the five men, the witness knew the accused and one Kwele. These five men appeared to the witness to be ready for a fight as upon entering

the tavern, they did not sit or stand together, but each one stood at a different position in the tavern. The accused approached the deceased on count 2 and deliberately stepped on his foot. An argument ensued and the accused invited the deceased on count 2 to take the argument outside. As there was now going to be a fight, all the people in the tavern including the witness proceeded outside the tavern.

4.1 Outside the tavern, the deceased on count 2 threw a beer bottle at the accused, who ducked, resulting in the bottle not striking him. Kwete then produced a firearm and fired shots at the deceased on count 2. The deceased in count 1 enquired from Kwete as to why he had shot the deceased on count 2, whereupon the accused produced a firearm and fired shots at the deceased on count 1. It is common cause that both deceased died on the scene because of multiple gunshot wounds. The three unknown men also each produced a firearm outside the tavern but did not fire any. The accused, Kwete and the other three men then ran away.

4.2 In cross-examination, the witness confirmed that he knows the accused as a singer but denied that he himself is a singer or is a part of a rival singing group. He was adamant that the accused was part of the group of five, was in possession of a firearm and shot the deceased in count 1. He knows the witness Kgetsu, but did not see her on the night in question as there were a lot of people present when the shooting took place. He disputed the version put that the accused entered the tavern alone, saw Kwete and of Ramakwana standing at the gate, heard gunshots whilst inside the tavern, exited the tavern to see what was happening outside, whereupon he saw the two deceased lying on the ground and Kwete and Ramakwana running away. The witness further denied the version that the

accused subsequently ran away on his own, due to allegations by people that the perpetrators of the shooting are from Klipspruit, from whence the accused emanates. The witness responded that the accused ran away, together with the other men, after the shooting. The witness testified that his statement was not read back to him and disputed that he had been consuming beer with the two deceased when the incident unfolded, stating that he had at that stage not consumed any alcohol and was about to order when the incident commenced. He confirmed that the deceased in count 1 was a singer and did not sing in the same group as the accused but stated that the deceased on count 1 was not part of a group.

4.3 On questioning by the court he stated that he had known the accused for a long time, as the latter is a singer, and had never spoken to the accused. The scene where the shooting took place was illuminated by street lights. He was 10 meters away from the first shooting and 5 meters from the accused when the second shooting occurred.

5. Mamosiwa Kgetsi testified that on the evening in question she was at the tavern with her friend. They purchased alcohol and just before they commenced consuming same, they heard a commotion outside the tavern. She and her friend joined the others who were exiting the tavern. She was 2 or 3 meters away from the accused and deceased on count 2. The latter was assaulting the accused with a bottle, which missed due to the accused ducking. Kwete then produced a firearm and fired shots at the deceased on count 2. The deceased in count 1 thereupon asked 'Man, why are you shooting this person?' The accused then produced a firearm and fired shots at the deceased on count 1. When the accused fired shots at the deceased on

count 1, he was standing with Kwete and another unknown person. Whilst she does not know the source of the lighting, the scene where the shooting took place was lit. She was 2 - 3 meters away when the accused shot at the deceased on count 1. The witness knew the accused for some five years prior to the incident. After the shooting, the three men ran down the street and entered a red vehicle and upon entering same it drove off. She has no knowledge as to why Kwete and the accused shot the respective deceased.

5.1 In cross-examination she stated that she did not know the previous witness at the time of the incident but did see him present at the shooting incident. She cannot recall when she made her statement. She did not see the other three people producing their firearms. She does not know of any rivalry between music groups that sing Sotho songs. She disputed that the accused was at the tavern alone and stated that she saw Kwete and the accused running away. She further disputed that the accused ran away due to fear of being assaulted because of threats to assault people from Klipspruit. She denied that she was falsely implicating the accused, stating that she knows what is true that he was involved in the commission of the offence.

5.2 On questioning by the court, she stated that she knew Kwete from the tavern, used to converse with him there, and that there were no problems between him and her.

6. The appellant testified. He stated that he knew the two deceased. The deceased on count 2 was a singer who belonged to a different group. He knew Makwanyama by

sight and the latter belonged to the same singing group as the deceased in count 2. The groups are burial groups, and one does not need to be a singer to belong to them. He had a good relationship with Makwanyana as well as the two deceased.

6.1 On the evening in question he arrived alone at the tavern at approximately 22h00 and saw Kwele and Ramatswana (previously referred to as Ramakwana when the version was put) outside the gate and greeted them. Inside the tavern he encountered Makwanyana and the two deceased. Shortly thereafter, the deceased on count 2 approached the accused, where he was seated alone, and informed the accused that they wanted to fight with people from Klipspruit who were around. The deceased on count 1 then approached the accused and enquired from him as what he and the deceased on count 2 were speaking about. The accused advised the latter deceased that there was going to be a fight with the people from Klipspruit and that it would be better for him, that is the accused, not to purchase alcohol and leave the tavern. The deceased on count 1 then left the tavern. The deceased in count 2 then stated to the accused that it was now nearing year end and they would have to fight these people. The deceased on count 1 then re-entered the tavern and both deceased then left the tavern.

6.2 The accused subsequently went outside the tavern, following other people. He then heard multiple gunshots. He did not see the deceased as there is a wall in the yard of the tavern. The illumination both inside the yard and on the street was good. When the gunshots ceased, he exited the yard and saw the two deceased lying on the ground. He then saw Kwele and Ramatswana running away. He does not

know why they were running away.

6.3 He denied stamping on the foot of the deceased on count 2. He did not know with whom there would be a fight when the deceased on count 2 referred to same. He denied that anybody threw a bottle at him. He did not know who was responsible for the shooting as he was in the yard of the tavern when same occurred and only exited once the firing had stopped. He denied shooting anybody and does own a firearm. He does not know why the witness implicated him.

6.4 The accused then testified that the two witnesses are well aware of the fact that many years ago, some family members of Kwete and Ramatswana were killed at the residence of the deceased on count 1 and the witness Kgetsi is related to the latter deceased.

6.5 In cross examination, he stated that the conflict between some of the members of the two singing groups relates to the aforesaid killings which occurred in 2009. No killings occurred thereafter. He has known Makwanyana since 2014 and Kgetsi since 1999. There has never been a problem between them. The accused, Kgetsi, the two deceased and Kwete and Ramatswana all emanate from Lesotho. He conceded that he is different to Ramatswana in stature and build. He could not explain why the deceased in count 2 approached him and told him about the people from Klipspruit. He left the tavern as people were stating that those responsible for the shootings were from Klipspruit and threatened to cut off the heads of those from Klipspruit. The witness Kgetsi is the sibling of the deceased in count 1 and Makwanyana is a family friend of both deceased and Kgetsi. Both State witnesses

know why the deceased was shot and by whom. They are implicating the accused because he is from Klipspruit, as are those who shot the two deceased.

6.6 On questioning by the court, the accused stated that he went to the scene where the people were killed in 2009. He knew those who had been killed and he knew Kwete at that stage. He was unable to properly explain why the deceased in count 2 approached him about the Klipspruit issue or why the deceased in count 1 approached him thereafter. He was unable to give the name of the street he resided in at Klipspruit and conceded that everybody would have seen that he had nothing to do with the murders and not all people from Klipspruit were being attacked after the incident.

ISSUES ON APPEAL

7. The issues to be determined on conviction are:

- 7.1. the credibility of the two eye witnesses.
- 7.2. whether the appellant was a part of the group that entered the tavern.
- 7.3. whether the accused provoked an argument with the deceased on count 2.
- 7.4. whether the accused was part of the common purpose in the murder of the deceased in count 2.
- 7.5. whether the accused shot the deceased in count 1; and
- 7.6. whether the accused was correctly convicted in terms of Section 51(1) of the minimum sentence legislation.

8. The issues to be determined on sentence are whether the court a quo was correct in imposing the minimum sentences and whether same is startlingly inappropriate in

the circumstances of the matter.

LAW AND ANALYSIS

9. It is trite that in a criminal trial, the onus of proof is on the State to prove its case beyond reasonable doubt. This is indeed a stringent test but is applied in order to ensure that only the **proven** guilty are convicted. It is further trite that the court is required to adopt a holistic approach in respect of the evidence and its assessment thereof, and use a common sense approach. It is not sufficient if the guilt of the accused appears possible or even probable – his guilt must be proven beyond reasonable doubt.¹
10. It is further trite that a court can convict on the evidence of a single witness if such evidence is satisfactory in all material respects. The evidence must not only be credible, but must also be reliable.²
11. Makwanyana was a single witness to the accused's entry with the other four men into the tavern: the stance the men adopted upon such entry; the provocation by the accused of the deceased in count 2 and the accused's invitation to the latter deceased to take the fight outside.
12. Both State witnesses were credible witnesses. Their evidence was clear and convincing.

¹ S v Hadebe & Others 1998 (1) SACR 422 (SCA), S v Van Der Meyden 1999 (1) SACR 447 (SCA), S v Phallo & Others 1999 (2) SACR 558 (SCA), S v Van Aswegen 2001 (2) SACR 97 (SCA), S v Shackel 2001 (2) SACR 185 (SCA), S v Chabalala 2003 (1) SACR 134 (SCA)

² R v Mokoena 1932 OPD 79, S v Webber 1971 (3) SA 754 (A), S v Sauls & Others 1981 (3) SA, S v Stevens 2005 1 All SA 1, S v Gentle 2005 (1) SACR 420 (SCA)

They were extensively cross examined and nothing material emanated therefrom. It is clear that they had simply come to court to relate what had occurred and what they had witnessed. They corroborated each other in material respects in relation to what occurred outside the tavern and the shooting of both deceased.

12.1. Neither of the witnesses were singers or members of any singing group and both denied any knowledge of alleged rivalry of such groups.

12.2 Makwanyana was a friend of the deceased in count 1. However, if he had wanted to falsely implicate the appellant, there was no need for him to concoct a story of the arrival of the appellant with Kwete and three other men. There was further no need to refer to how these people positioned themselves in the tavern or how the accused provoked the deceased in count 2 and the accused's request that they take the argument outside. The very fact that the argument did move outside the tavern is what led to Kgetsi, her companion and the other patrons going outside to see what was happening.

12.3 The differences in their testimony, rather than being contradictions, relate to what each observed and these are, in any event, not material. It does not matter, for example that Kgetsi saw three people running away and entering a red vehicle, whereas Makwanyana stated that the five men ran away. What is material is that amongst the men who ran away were Kwete and the accused, who had respectively shot the second and first deceased. It is trite that in a volatile, moving scene, such as this matter was, witnesses observe different things.

12.4 Notwithstanding that Makwanyana was a single witness regarding what had occurred in the tavern, I am of the view that his evidence was satisfactory in all material respects. I am further of the view that the learned Magistrate correctly accepted the evidence of both witnesses

13. The appellant, on the other hand was a most unimpressive witness. His evidence was riddled with improbabilities and inconsistencies and he concocted new versions as he went along. Significantly, and for the first time in cross-examination, the court heard, of material issues, inter alia, that both deceased allegedly approached him in the tavern prior to the shooting, that Kgetsi was allegedly the sibling of the deceased in count 1. the alleged prior killings of Kwete and Ramatswana's family members by family members of the deceased on count 1. None of these issues were put to the State witnesses. Whilst the true motive for the murders in this matter remains obscure, the accused was unable to provide any reason as to why the State witnesses were allegedly falsely implicating him in the murders. On his own version, he had known them for a long time and there had never been any issue or bad blood between them.

13.1 I am of the view that the learned Magistrate correctly rejected his version as false beyond reasonable doubt.

14. It is clear from the evidence that there was planning involved in the commission of these offences.

14.1 Regarding the murder of the deceased in count 2:

14.1.1 It is clear from the evidence that the appellant was part of the group who

entered the tavern and took up different positions therein.

14.1.2 It was further the appellant who initiated the argument with the deceased in count 2 by standing on his foot.

14.1.3 It was the appellant who suggested that the argument be taken outside the tavern.

15. It is apparent from the evidence that there was a prior agreement to murder the two deceased. In any event, the appellant satisfies the requirements of common purpose in the absence of proof of a prior agreement, as set out in **S v Mgedezi and Others 1989 (1) SA 687 (A)**.

16. Having regard to all the foregoing, I am of the view that the learned Magistrate was correct in finding that the State had proved its case beyond reasonable doubt and was thus, correct in convicting the appellant, as charged, on both counts.

17. Regarding sentence, the appellant was charged in terms of Section 51(1) of the minimum sentence legislation and accordingly faced a minimum sentence of life imprisonment on each count.

17.1 The locus classicus on the issue of substantial and compelling circumstances is The decision of **S v Malgas 2001 (2) SA 1222 (SCA)** wherein it was stated that the prescribed minimum sentences are not to be departed from lightly or flimsy reasons and not unless there are truly convincing reasons to do so.

17.2 In this matter, the aggravating circumstances far outweigh the mitigating factors.

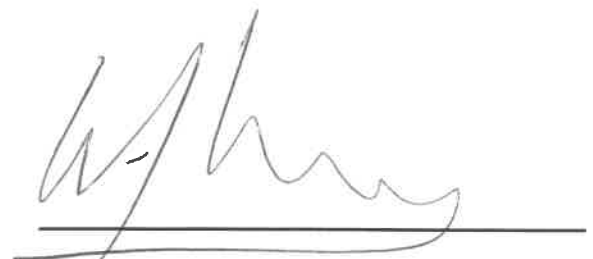
The appellant was part of a group of armed men. He too, was armed. He played a leading role in provoking the deceased in count 2, and in having the argument move outside the tavern. Upon the deceased in count 1 merely asking Kete why he had shot the deceased in count 2, the appellant unhesitatingly shot the deceased in count 1 multiple times.

17.2.1 The appellant displayed no remorse whatsoever.

18. I am of the view that the learned Magistrate, considering all the mitigating and aggravating factors, correctly found that there were no substantial and compelling circumstances warranting a departure from the prescribed minimum sentences on counts 1 and 2.

19. In the circumstances, I make the following Order:

19.1 The appeal against conviction and sentence is dismissed.

A handwritten signature in black ink, appearing to read 'WA KARAM', is written over a horizontal line.

WA KARAM

ACTING JUDGE OF THE HIGH COURT

I AGREE

CB Bhoola

CB BHoola

ACTING JUDGE OF THE HIGH COURT

Appearances:

Date of hearing: 27 February 2023

Date of Judgment: 23 May 2023

APPELLANT: Adv M A. Khunou
Instructed by Legal Aid SA
Johannesburg Office

RESPONDENT: Adv N Kowlas
Director of Public Prosecutions
Gauteng Local Division