

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A140/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 12/6/2023

MOKOSE SNI

In the matter between:

MAGASELA, MZWANDILE RONALD

Appellant

and

THE STATE

Respondent

JUDGMENT

MOKOSE J

[1] The appellant, who was represented in the court *a quo*, was charged in the Regional Court sitting at Benoni of one count of murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997.

[2] The appellant pleaded not guilty to the charge of murder. He was subsequently found guilty as charged and was sentenced to 15 years imprisonment. He was also declared unfit to possess a firearm. The Regional Magistrate granted leave to appeal against the conviction and sentence imposed.

[3] The issue in this appeal is the reliability placed on the evidence of the main witness for the State and whether the appellant was correctly convicted as a result.

[4] The appellant contends that the Magistrate erred in accepting the evidence of Mr Lucky Tanzwane as being reliable despite there being certain inconsistencies in his evidence and rejecting the version of the appellant as being improbable and not finding that his evidence was reasonably possibly true.

[5] Furthermore, the appellant appeals against the sentence on the grounds that the Magistrate failed to attach sufficient weight to the personal circumstances of the appellant thus failing to find substantial and compelling circumstances which would have allowed him to deviate from imposing the minimum sentence of 15 years imprisonment and impose a lesser sentence.

[6] The charge had arisen from an incident which occurred on 18 May 2018 in which it was alleged that the appellant had killed one Thabo Mac Khoza by shooting him with a firearm. The appellant pleaded not guilty and in his plea explanation, it was said that the deceased had grabbed the appellant's firearm when a shot went off and struck him in the head.

[7] Two witnesses testified on behalf of the State – Dr Itumeleng Motlounq who performed the post-mortem and furnished the court with a report and Mr Lucky Tanzwane, a security officer who was on duty on 18th May 2018 at Calderwood Estate where the incident took place.

[8] Mr Lucky Tanzwane testified that he was on duty as a security guard on 18 May 2018 and that at about 20H45 the appellant arrived at the complex complaining that there was a lady who was being harassed by the deceased. He then went to the property with the appellant where they found the deceased pulling the security gate of the said unit. He testified that it was thought that the deceased and the occupant of the unit were in a relationship and that the occupant of the unit had denied the deceased entry to the unit. Mr Tanzwane testified further that he thought it best to remove the deceased who lived in the same complex from the unit he was

trying to gain access to. He pulled him away as the deceased was continuously insulting the lady.

[9] At this time, the appellant's young child who was in the company of the appellant at the time, began to cry. He then took the child to his nearby unit. Mr Tanzwane testified that he thought that the deceased had approached the young child with the intention of moving him which angered the appellant thus causing a scuffle. Mr Tanzwane then pushed the deceased towards the stairs to avoid a full-on confrontation with the appellant. The deceased who was holding a bottle of beer in his hand, pushed it against the appellant's chest. Mr Tanzwane then intervened and confiscated the bottle from the deceased. He leant slightly forward to get underneath the deceased and pushed him towards the stairs. Whilst pushing him, he heard a gunshot and saw the deceased falling by the stairs. At that moment, he saw the appellant holding a firearm.

[10] Dr Motlounq testified that he had performed a post-mortem examination on the body of the deceased and had found that the cause of death was a gunshot wound to the head. He testified that the projectile went through the brain matter on the left and partially on the right and indicated that the entrance wound was on the left top of the head and that the exit was on the right back of the head. He informed that the projectile went through all the vital structures in the head, in layman's terms. This evidence remains undisputed.

[11] The appellant testified in his own case. He testified that on the day in question, he arrived home from work between 20H00 and 20H30 whereupon, he took his firearm and went to fetch his three-year old son. As he was preparing food for his child, a female neighbour arrived at his flat complaining that she was being harassed by an ex-boyfriend. He accompanied her to her flat but did not testify as to what happened when they arrived there. He returned to his flat but subsequently received a call from the lady requesting him to go to the main gate and summon a security guard. He did so and returned to his flat. He then heard a noise and upon opening his door a while later, had a confrontation with the deceased who was passing by his unit, as he was disturbing the peace. His son managed to get out of the flat and did not know where he got to. It was at this time that the deceased hit

him twice on the chest with the beer bottle. He testified that he urged him to stop but to no avail. The deceased stumbled over the appellant's son who began to cry whereupon the appellant rushed the child into the flat.

[12] The appellant further testified that the 9mm firearm was in its holster, concealed by the jacket he was wearing. The safety catch of the firearm was off and there was a bullet in the chamber. He testified that he normally carried the firearm like that when he drove to enable him to draw it and shoot when in danger and if necessary. He elaborated that he had the firearm directed at the ground but that the deceased grabbed it, lifted the appellant's hand causing him to pull his hand back resulting in a shot going off and hitting him in the head. He denied that he had intentionally shot the deceased in the head and assumed that when he pulled back the firearm, the force of resistance may have caused the firearm to be directed to the deceased's head. In cross-examination the appellant said that he did not make his firearm safe whilst he was on his way to the flat as he never handled it in the presence of his young child.

[13] It is trite law that the onus of proof rests with the State to prove the guilt of an accused beyond reasonable doubt. It is not for the accused to rebut an inference of guilt by providing an explanation. If the accused's version is only reasonably possibly true, he would be entitled to an acquittal. The court in the matter of *Shackle v S*¹ held:

"The court does not have to be convinced that every detail of an accused's version is true, if the accused's version is reasonably possibly true, in substance, the Court must decide the matter on acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities; but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said that it will be so improbable that it cannot be reasonably possibly true."

¹ 2001 (1) SACR 279 (SCA) at 288 E - F

[14] A court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.² Poonan JA in the case of *S v Monyane and others*³ stated:

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited.....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)."

[15] Heher AJA in the matter of *S v Chabalala* ⁴ said:

"The correct approach is to weigh up all the elements which points 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

[16] It is settled that a Court of Appeal will not interfere easily with a finding of fact and credibility made by the trial court and I refer to *R v Dlumayo and Another*.⁵ 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 discarded if, the recorded evidence showed them to be clearly wrong. The reason for this is simply that the trial court sees and hears the witnesses and is steeped in the atmosphere of the trial. The

² *S v Francis* 1991 (1) SACR 198 (A) at 198J – 199A

³ 2008 (1) SACR 543 (SCA) at paragraph 15

⁴ 2003 (1) SACR 134 (SCA) at page 140 A - B

⁵ 1948(2) SA 677 (A) 705-6

Court of Appeal, on the other hand, considers only the mute trial record of first instance and is not in a position to take into account the witness' appearance, demeanour and personality.

[17] In the absence of a factual error or misdirection on the part of the trial Court, its finding is presumed to be correct. This was also held to be the position in *S v Bailey*⁶ and *Minister van die Suid-Afrikaanse Polisie en 'n ander v Kraatz en 'n ander*⁷. This principle has been confirmed and properly enunciated in *S v Hadebe and others*.⁸ The Court cautions that one must guard against a tendency to focus too intently on -

“...separate and individual parts of what is after all a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the available evidence.”

[18] The appellant took issue with the evidence of the main witness, Mr Tanzwane. However, I note that the Magistrate treated the evidence of Mr Tanzwane with the necessary caution of a single witness to the event. The Appellant argued that this witness had contradicted himself to such an extent that the court could not rely on the evidence. Guidelines for the treatment of single witness evidence were enunciated in the matter of *S v Sauls*⁹ where the court said:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness...the trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision but it does not mean that the appeal should succeed if any criticism, however slender, of the witnesses' evidence were well founded....It has been said

⁶ 2007(2) SACR 1 (C)

⁷ 1973(3) SA 490 (A)

⁸ 1997(2) SACR 641 (SCA)

⁹ 1981 (3) SA 172 (A)

more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

[19] Counsel for the appellant contends further that the Magistrate erred in accepting the evidence of Mr Lucky Tanzwane as being reliable despite there being certain inconsistencies in his evidence. Contradictions *per se* do not lead to a rejection of a witness' evidence. As Nicholas J as he then was, observed in *S v Oosthuizen*¹⁰ they may simply be indicative of an error. At page 576G-H he said that not every error made by a witness affects his credibility; in each case the trier of fact must make an evaluation taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence. In my view, no fault can be found with the conclusion that the inconsistencies were of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction. The court in the matter of *S v Mafaladiso en Andere* the court held:

“...in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof.”

[20] I am satisfied that the Magistrate evaluated the evidence and cautiously dealt with the contradictions of the witness. I accordingly find that the contradictions in the evidence are not material. There is no obligation upon the State to close each and every avenue of escape which may be open to an accused. It is sufficient for the State to produce evidence wherein a high probability is raised that the ordinary man, after a mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged.¹¹

¹⁰ 1982 (3) SA 571 (T) at 576B-C

¹¹ *S v Phallo and Others* 1999 (2) SACR 558 (SCA) at 559 A - C

[21] In view of the principles enunciated in *S v Hadebe (supra)* the Magistrate's Courts findings of fact and credibility are presumed to be correct. Accordingly, the court of appeal will not easily depart from such findings.

[22] The appellant also appeals against the sentence of the Magistrate's Court of 15 years imprisonment on the grounds that it is shockingly inappropriate in that it is out of proportion to the totality of accepted facts in mitigation and that Magistrate erred in finding that there were no substantial and compelling factors present in the case to deviate from the minimum sentence.

[23] It is trite law that sentence is pre-eminently at the discretion of the trial court. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was violated by misdirection. The court of appeal may interfere with the sentencing discretion of the court of first instance if such discretion had not been judicially exercised. Marais AJ in the matter of *S v Malgas*¹² observed that:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where a material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In so doing, it assesses sentence as if it were a court of the first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appropriate court may yet be justified in interfering with the sentence imposed by the court. It may do so only where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasized that in the latter situation

¹² [2001] 3 All SA 220 (SCA) para 12

the appellate court is large in the sense in which it is at large in the former. In the latter situation, it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.”

[24] When imposing sentence, a court must try to balance the nature and circumstances of the offence, the circumstances of the offender and the impact that the crime had on the community. It must ensure that all the purposes of punishment are furthered. It will take into consideration the established main aims of punishment being deterrence, prevention, reformation and retribution.

S v Zinn 1969 (2) SA 537 (A)

[25] This approach was followed by the court in the matter of *S v Rabie*¹³ where Holmes JA said:

“Punishment should fit the criminal as well as the crime, and be fair to society, and be blended with a measure of mercy according to the circumstances.”

[26] The trial court considers for the purposes of sentence, the following:

- (i) the seriousness of the case;
- (ii) the personal circumstances of the Appellant;
- (iii) the interests of society.

[27] The provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 were explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced

¹³ 1975 (4) SA 855 at 862 G - H

to imprisonment as per the minimum sentence unless there are compelling and substantial reasons to deviate from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons and must be respected at all times.

*S v Matyityi*¹⁴

[28] There is no definition of what constitutes compelling and substantial reasons. The court must consider all the facts of the case in determining whether compelling and substantial circumstances exist. To arrive at an equitable sentence, this court is enjoined to weigh the personal circumstances of the accused against the aggravating factors, in particular, the interests of the society, the prevalence of the crime, and its nature and seriousness.

[29] The appellant's personal circumstances were placed before the court. They are that he was a first offender, had three minor children that he supports and was 39 years old at the time of the offence. The appellant was employed as a security guard at RTT at the time of the commission of the offence and earned R17 000 per month. Furthermore, the appellant was remorseful and had apologised to the family of the deceased for their loss.

[30] Counsel for the respondent was of the view that the Magistrate had taken account of all the relevant factors in the triad in consideration of the triad and that the sentence imposed was fair and just in the circumstances and that there are no substantial and compelling reasons which would have justified the deviation from the minimum sentence imposed and that would justify this Court to interfere in the sentence.

[31] The court is informed that the accused is remorseful and that he had apologised to the family of the deceased. The Court in the matter of *S v Matyityi*¹⁵ dealt with what it means to be remorseful. It held that:

¹⁴ 2011 (1) SACR 40 (SCA) at page 53 E - F

¹⁵ 2011 (1) SACR 40 (SCA) at 47A - D

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgment of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent’s knowledge, was explored in this case.”

[32] I am not convinced that the appellant is remorseful. I do not see the contrition that is expected of one that is remorseful as enunciated in the matter of Matyityi (*supra*). I am of the view that the appellant is sorry or regretful of the offence which is not remorse. Accordingly, I am of the view that the Magistrate has not erred in any way as to justify this Court to interfere in the sentence imposed in the court *a quo*. There were no substantial and compelling reasons to sentence the Appellant to a lesser sentence than that prescribed by the provisions of Act 51 of 1977 nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised.

[33] Accordingly, the following order is granted:

The appeal against both conviction and sentence are dismissed.

MOKOSE J
Judge of the High Court of South Africa

Gauteng Division, Pretoria

I agree and is so ordered.

SARDIWALLA J

Judge of the High Court
of South Africa
Gauteng Division, Pretoria

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Date of hearing: 11 November 2021

Date of judgement: 12 June 2023