



**THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION**

Reportable: YES/NO

Case No: A77/2023

In the matter between:

**KOPANO LAWRENCE TSHIU
MAHLOMOLA ERIC MABINA**

First Appellant
Second Appellant

and

THE STATE

Respondent

Coram: Opperman, J *et* Zietsman, AJ

Heard: 23 October 2023

Delivered: 27 October 2023. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 27 October 2023. The date and time of hand-down is deemed to be 15h00 on 27 October 2023

Judgment: Opperman, J

Summary: Appeal – conviction – sentence

JUDGMENT

- [1] The appellants come to this court on appeal against their conviction of murder as well as the sentence of life imprisonment that was imposed on them in the regional court. They rely on their automatic right to appeal.
- [2] They were charged with murder read with the provisions of section 51(1) of the General Law Amendment Act 105 of 1997. Section 51(1) decrees that notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a high court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life. Part I of Schedule 2 subsection (d) finds application and refers to: "Murder, when (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy;"
- [3] The appellants were represented by counsel *a quo*. Afore the trial commenced the terms of the legislatively prescribed minimum sentences and the consequences thereof were explained to the accused. The issue of common purpose was as such explained.
- [4] The incident of the murder occurred during some cultural initiation ceremonies of young men. The two accused, carrying weapons, arrived with other men where the deceased and his group were. The two accused violently started to provoke a fight but the deceased and his companions decided to flee. They got into a vehicle but the deceased; whilst running behind this vehicle, and trying to get onto the vehicle, was accosted by among others, accused one and two and killed by them. It is the version of the two accused that they were at the scene but did not partake in the assault of the deceased.
- [5] The court *a quo* gave a well-reasoned and thorough depiction of the evidence. The portrayal and evaluation of the evidence cannot be faulted. Counsel for the appellants, correctly so, conceded that the contradictions between the witnesses cannot be labelled to be material and fatal for the case of the State. In fact, counsel for the State argued that she would have

been suspicious of witnesses that corroborated each other on all the issues in the circumstances that prevailed. They testified from different vantage points in different moments of the incident.

- [6] The reliability of the observation of the witnesses must be tested and a court must carefully consider the opportunity the witnesses had for correct identification. The reliability of identification depends on various factors. In *S v Ndika and others* 2002 (1) SACR 250 (SCA) the Supreme Court of Appeal noted that:

[20] It is of course so that the honesty of a witness in identifying a person is not by itself a guarantee of its correctness. The objective circumstances attending the observation of the person and the state of mind of the observer is just as critical.

- [7] Counsel for the State correctly submitted in address that all the witnesses had adequate time and opportunity for identification. The visibility was good and there was nothing to obstruct the view of the witnesses. None of the state witnesses had any reason to falsely implicate the appellants. The state witnesses testified with clarity and confidence about the identification of the appellants. There were no material contradictions in the evidence of the state witnesses. The contradictions that exist were evaluated and found not to be material.

- [8] The versions of the appellants fail dismally if compared with the evidence as a whole. The explanation of the appellants that they were at the scene of certain events, but then to conveniently extricate themselves from the scene where the assault occurred, was correctly rejected by the court *a quo*.

- [9] It was aptly pointed out by the State; and due regard was given to this fact *a quo* as emphasized by Nugent, JA in *S v Mbuli* 2003 (1) SACR 97 (SCA), that:

[57] It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford* 1937 AD 370 at 373, 383). In *S v Van der Meyden* 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the

accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in *Moshephi and Others v R LAC* (1980 - 1984) 57 at 59F - H, which was cited with approval in *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426f - h:

‘The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a 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 other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.’

- [10] Although an accused has a right to appeal, 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 of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.
- [11] The appeal of both appellants against their conviction cannot stand.
- [12] The murder and the manner in which it was committed are atrocious. A young man, at no time having been part of any of the conflict stirred on by the appellants and fleeing for his life; was violently assaulted and killed. The appellants acted with a total disdain for human life. The postmortem report shows that the violence perpetrated was severe. The ease with which murders are committed in our society is of grave concern. Life has become too cheap.

- [13] The factors to be regarded and as submitted by the appellants during the adjudication of the sentences did not impress as substantial and compelling. It was mundane in comparison to the circumstances of the case.
- [14] From the evidence adduced in the court below and the factors pointed out in the appeal, there is nothing that indicates that the trial court did not apply her mind judiciously and with due care. She did not misdirect herself. Her sentence is in accordance with the prevailing legislation and law. There is not any issue that dictates for the interference of this court. The sentences were apt and appropriate in the circumstances. In *S v Ncheche* 2005 (2) SACR 386 (W) Goldstein, J (Coram: Goldstein J, Snyders J and Willis J), concluded that:
- [1] In *S v Bopape* (unreported WLD case No A548/01), I delivered a minority judgment in which I expressed the view that this Court is bound, when imposing sentence to following the precedents established by the Supreme Court of Appeal when that Court sets aside a sentence on appeal and itself determines an appropriate sentence. I have reconsidered that view and now believe it to have been erroneous for the reasons which follow.
- [2] In *S v Pieters* 1987 (3) SA 717 (A), Botha JA stated at 734D - F that the decisive question facing a Court of appeal on sentence was whether it was convinced that the court which had imposed the sentence being adjudicated upon had exercised its discretion to do so unreasonably. If so, the Court of appeal was entitled to interfere and, if not, not. After pointing out, at 734G - H, that the determination of a specific period of imprisonment in a particular case cannot occur in accordance with any exact, objectively valid standard or measure, the learned Judge of Appeal goes on at 734H - I to say (citing *R v Alwyn* 1955 (3) SA 207 (A) at 213B - D, *S v Sibiya* 1973 (2) SA 51 (A) at 58B - 59A, and *S v Skenjana* 1985 (3) SA 51 (A) at 54I - 55F) that, even if the Court of appeal is of the view that it would have imposed a much lighter sentence, it would not be free to interfere if it were not convinced that the court below could not reasonably have imposed the sentence which it determined. In *Alwyn*, five Judges of Appeal subscribed to the view that they would have imposed a suspended sentence if they had been the court of first instance; nevertheless, they dismissed an appeal against an effective sentence of 18 months' imprisonment; this aspect of the case was referred to with approval in *Sibiya* at 58E - F.
- [3] In *Hiemstra Suid-Afrikaanse Strafproses* 6 ed at 836 - 7, the learned authors, Kriegler and Kruger, say that Botha JA's dicta on sentence in *Pieters* have been repeatedly approved by the Appellate Division and ought to be the last word on the subject. Respectfully accepting that this is so, it seems to me to follow that, provided that a court imposing sentence exercises its discretion reasonably, it is not bound by sentences imposed by other courts, including higher Courts. (Accentuation added)

[15] **ORDER**

The appeal against the conviction and sentence of both the first and second appellants is dismissed.



M OPPERMAN, J

I concur



P.W.J. ZIETSMAN, AJ

APPEARANCES

On behalf of the appellants

P.L. VAN DER MERWE/

S KRUGER

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On behalf of the respondent

B.G. CLAASSENS

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