



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: AR101/2022

In the matter between:

NONHLAHLA FORTUNATE NXUMALO

APPELLANT

and

THE STATE

RESPONDENT

ORDER

The following order is made.

- 1. The appeal is dismissed.**
- 2. The convictions and sentences imposed are confirmed.**

J U D G M E N T

SMART AJ (VAHED J concurring)

[1] This is an appeal against the conviction and sentence of the appellant by the Mtubatuba Regional Magistrates' Court on one charge of murder and two charges of assault with intent to do grievous bodily harm.

[2] The appellant was found guilty of murder and of two charges of assault with intent to do grievous harm on 6 May 2019. On 30 May 2019, the appellant was sentenced to ten years imprisonment for murder and three years' imprisonment for each of the two charges of assault with the latter two sentences to run concurrently with the sentence imposed for the charge of murder. The appellant was acquitted on charge 4. Accused 2, Mr Vulaphi Nxumalo, was found guilty of only one of the charges of assault and accused 3, Mr Ayanda Gumede, was acquitted of all of the charges.

[3] The appellant pleaded not guilty to the charges and elected to remain silent.

[4] An application to the court a quo by the appellant for leave to appeal against both the convictions and sentences was granted on 15 July 2019.

[5] The charges against the appellant and accused 2 and 3 arise from an incident that occurred on 1 January 2018 at the Msane area in KwaZulu-Natal when Mr Siyabonga Madonsela was killed (Count 1) and the three complainants, Mr Sicelo Sibiya, Mr Mduduzi Mthethwa and Mr Siphon Gumede, were assaulted (Counts 2, 3 and 4, respectively).

[6] In the trial court the respondent relied on the evidence of three witnesses, all three of whom were the complainants in the charges of assault. In respect of the charge of murder, the state relied on the evidence of a single witness, Mr Siphon Gumede.

[7] In respect of the charges of assault with intent to do grievous bodily harm, the respondent led the evidence of Mr Mthethwa. Mr Mthethwa's evidence was that he and friends were celebrating the commencement of the new year at his family's homestead. The persons with him were Mr Siyabonga Madonsela ("the deceased"), Mr Sibiya, the complainant in count 2, and Mr Gumede, the complainant in count 4. They were seated outside when Mr Mbekiseni Ngape arrived and demanded a cigarette from Mr

Gumede. Mr Ngape is the paternal uncle of the appellant. Mr Gumede refused to provide Mr Ngape with a cigarette and he was asked to leave the premises which he did.

[8] Mr Mthethwa and Mr Sibiya then entered the home to prepare food and, whilst they were inside the home, they were called outside and advised that a fight had broken out outside the home. When they exited the house they found the deceased lying on the ground. Mr Mthethwa saw the appellant and the two other accused outside his home. The appellant was in possession of a knife, accused 2 was in possession of a bush knife and accused 3 had in his possession bottles and stones. Mr Mthethwa then noticed that Mr Gumede had an injury on his head. Mr Mthethwa and Mr Sibiya attempted to chase the appellant and the other two accused away. Whilst Mr Mthethwa was attempting to remove accused 2 from the premises, the appellant assaulted him from behind. Initially Mr Mthethwa thought that she was hitting him with her hands but then realised that she was stabbing him with a knife.

[9] Having been injured, Mr Mthethwa returned to the safety of his home where he lost consciousness. He was transferred to Hlabisa Hospital and remained there for four days. According to the report of his attending doctor, Dr Quicke, he had sustained stab wounds on the left side of his chest and two wounds on his back. He was also injured on his tongue and cheek. Mr Mthethwa's further evidence was that he knew the appellant as she had been his neighbour for about ten years.

[10] The evidence of Mr Sicelo Sibiya was that he and Mr Mthethwa went into the house to prepare the meat which had been cooked, leaving the deceased and Mr Sipho Gumede outside. When he and Mr Mthethwa were called outside, Mr Sibiya found the deceased injured on the ground and bent down to assist him. He then felt someone hitting him on his back and realised he was being stabbed. When he turned around, he noticed the appellant running away. Accused 2 then approached Mr Sibiya with a bush knife. He tried to remove the bush knife from accused 2 but decided to flee

when he was approached by the appellant.

[11] Mr Sipho Gumede's evidence was that he was seated outside the house on the veranda with the deceased. The appellant and a male person approached him and asked him for a cigarette. He refused the request and was then assaulted by the appellant with an open hand. The deceased reprimanded the appellant who then stabbed him. When Mr Gumede tried to stand up to assist the deceased, accused 2 hit him with the bush knife on his head and he lost consciousness. He was hospitalised for a month.

[12] The evidence of the appellant was that she and accused 2 and 3 went to the Mthethwa homestead to participate in the new year celebrations. She stated that there were many people there. Whilst she was there, her uncle, Mr Ngape, arrived and requested that accused 2 and 3 call Mr Mthethwa. Her evidence was that Mr Mthethwa hit accused 2 with a bush knife. When reprimanded, Mr Mthethwa slapped the appellant and she fell to the ground. According to the appellant, accused 3 was also struck by Mr Mthethwa, a fight then ensued and Mr Sibiya tried to stab accused 3. The appellant pushed Mr Sibiya and he fell onto the ground with her. She tried removing the knife from him and someone grabbed Mr Sibiya and she fled the scene. Under cross examination, the appellant stated that she did not take possession of the knife and merely held it by the blade. Her intention was to prevent a fight. She also stated that she did not notice that anyone was injured.

[13] The evidence of accused 2 was that he was asked by Mr Ngape to call Mr Mthethwa. He did so and Mr Mthethwa struck him on his head with a bush knife. The appellant and accused 3 came to his assistance and Mr Mthethwa slapped the appellant and assaulted accused 3. Accused 2 stepped back and then Mr Mthethwa kicked him on his chest. Accused 3 then fled home. His evidence was that he was hit with the flat side of the bush knife and suffered a bump to his head.

[14] According to the evidence of accused 3, he knocked at the door of one

of the structures at the Mthethwa homestead after having been requested to find Mr Mthethwa. Mr Mthethwa came from behind and hit him on his head with a bush knife. Mr Sibiya then assaulted him and drew a knife and tried to stab him. Mr Sibiya then tried to stab the appellant who grabbed the knife.

[15] None of the accused sought medical assistance for the injuries alleged to have been suffered by them and nor were any charges brought against the complainants for assault.

[16] Mr Ngape gave evidence on behalf of the defence. He stated that he requested accused 2 to call Mr Mthethwa as he had agreed to transfer music for him onto a USB stick. A fight then ensued at the Mthethwa homestead. Mr Mthethwa and Mr Sibiya assaulted accused 2. Mr Ngape then advised the appellant and the other accused to leave the premises.

[17] The learned magistrate carefully analysed all the evidence before her, considered all the arguments presented and, in a well-reasoned judgment, concluded that the appellant was guilty of the charges referred to above. In my view the learned magistrate cannot be faulted for finding the appellant guilty of the crimes she was charged with.

[18] The learned magistrate found that the respondent's witnesses were honest in their evidence and that their evidence was clear and straightforward. She also found that the evidence of the appellant and accused 2 and 3 was improbable, albeit that they corroborated each other's versions. These findings are not inconsistent with the evidence presented before the learned magistrate.

[19] When an appeal is lodged against the trial court's findings of fact, the appeal court should take into account the fact that the trial court was in a more favourable position than itself to form a judgment because it was, *inter alia*, able to observe the witnesses during their questioning and was

absorbed in the atmosphere of the trial.¹ It is trite that the presiding officer who has an opportunity to assess the evidence of a witness, with the benefit of observing his demeanour, is best placed to make a finding on credibility. Unless that finding is so incredible as to be unreasonable, an appeal court should not interfere with such a finding.

[20] The version proffered by the state and that of the appellant at the trial are diametrically opposed to each other as far as the identity of the person or persons who killed the deceased is concerned. Mr Gumede's evidence was that he saw the appellant stabbing the deceased with a knife. The appellant on the other hand contends that she did not stab the deceased and did not witness the killing of the deceased or the assaults on the complainants. The two versions in my view are mutually destructive.

[21] The approach to resolving two irreconcilable, mutually destructive factual versions is well-established in our law and require no repetition.² Applying these principles to the evidence above, it is common cause that the state relied on the evidence of a single witness. It is trite that the evidence of a single witness must be approached with caution and should be clear and satisfactory in all material aspects. However, our courts have stressed the fact that the exercise of caution must not be allowed to displace the exercise of common sense.³

[22] Section 208 of the Criminal Procedure Act 51 Of 1977 is relevant herein. It provides that an accused may be convicted of any offence on the single evidence of any competent witness. The trial court cannot be faulted in accepting the evidence of Mr Gumede as satisfactory notwithstanding that he was a single witness. The bare denial by the appellant of the assault is to be expected in the circumstances but cannot be accepted as true.

¹ *S v Monyane and Others* [2008 \(1\) SACR 543](#) (SCA).

² *Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others* 2003 (1) SA 11 (SCA) para 5

³ *S v Artman and Another* 1968 (3) SA 339 (SCA).

[23] In my view, the trial court was alive to the fact that it was dealing with the evidence of a single witness as far as the murder of the deceased was concerned and of the applicable cautionary rule. There was no evidence that there was any motive for Mr Gumede to incriminate the appellant falsely. From the evidence of the three complainants and that of the appellant and accused 2 and 3, the appellant was indeed at the scene at the time of the incident. The trial court made a finding that the three state witnesses made a good impression in the manner in which they clearly and directly answered the questions put to them. The trial court was satisfied that the complainants knew the appellant. In my respectful view, these findings by the trial court are beyond reproach. They cannot be faulted at all.

[24] To my mind, in the light of the uncontroverted evidence by Mr Gumede, in respect of the murder charge, and the three witnesses called on behalf of the respondent in support of the charges of assault, the evidence of the appellant and accused 2 and 3 and of her witness that she was not involved in the murder of the deceased is contrived, far-fetched and cannot be said to be reasonably possibly true. Although the incident happened at night, there was sufficient lighting on the property and the complainants were positioned close enough to the appellant and the other accused to identify them. The complainants and the appellant knew each other well. The complainants had a clear vision and could identify the appellant and the other accused. This in my view cannot be a case of mistaken identity.

[25] Appellant's counsel argued that there were significant contradictions between the evidence of Mr Gumede and his statement made to the police. I disagree. In *S v Bruiners*⁴ it was said that contradictory versions must be considered on a holistic basis. In order to discredit a witness on the basis of his affidavit, it was necessary that there had been a material deviation by the witness from his affidavit before any negative inference could be drawn. In *S v Govender and others*⁵ Nepgen J discussed the issue extensively. He

⁴ 1998 (2) SACR 432 SE)

⁵ (2006 (1) SACR 322 E and see also *S v Mafaladiso en andere* 2003(1) SACR 583 SCA)

pointed out that it is important that it should always be borne in mind that police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable.

[26] I am in agreement with the learned magistrate that the totality of the evidence presented against the appellant proved beyond reasonable doubt that she was guilty of the crimes she was charged with.

[27] Accordingly, the appellant was correctly convicted of the crimes she was charged with.

SENTENCE

[28] The crime of murder for which the appellant was convicted carries a minimum sentence of fifteen years for a first offender in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 unless compelling and substantial factors are present to detract from the minimum sentence.

[29] It was argued on behalf of the appellant that this was the first time that the appellant was convicted. Further submissions made on her behalf were that she was 18 years of age at the time of the offence and a learner in Grade 12 and that she was the mother of a three-year-old child. In the circumstances, argued the appellant, the effective term of imprisonment of ten years was shockingly inappropriate.

[30] The trial court took into consideration the personal circumstances of the appellant and found that these were substantial and compelling circumstances sufficient to deviate from the minimum sentence of fifteen years and sentenced the appellant to imprisonment for a period of ten years.

[31] It is trite that the appropriate sentence that is to be imposed in a particular case is a matter that falls particularly within the discretion of the trial court except where certain circumscribed and defined circumstances exist which requires the appeal court to interfere.

[32] In the present case the sentences imposed on the appellant are far from inappropriate. The sentences imposed are not different from what this court would have imposed. Any lesser sentence would not serve the interests of justice.

ORDER

[33] Accordingly, the following order is made:

1. **The appeal is dismissed.**
2. **The convictions and sentences imposed are confirmed.**

SMART AJ

VAHED J

Date of Hearing:	Friday, 02 June 2023
Date of Judgment:	Friday, 09 June 2023
For Appellant:	Mr TP Pillay
Instructed by:	Legal Aid South Africa (Durban Justice Centre) Appellant's Attorneys The Marine Building 22 Dorothy Nyembe Street Durban (Ref.: Mr TP Pillay) (Tel: 031 – 3040100) Email:
For Respondent:	Ms L Zondi

Instructed by:

The Director of Public Prosecutions
Respondent's Attorneys
5th Floor
Southern Life Building
88 Joe Slovo Street
Durban...KZN
(Ref: Ms L Zondi)
(Tel: 031 – 334 5087 / 033 –845 4400 / 845 8700)
Email: zondi@npa.gov.za