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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case Number: A94/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

T[...] J[...] S[...]

Appellant

and

THE STATE

Respondent

CORAM: REINDERS J *et* VELE AJ *et* THAMAE AJ

JUDGMENT BY: REINDERS J

HEARD ON: 11 SEPTEMBER 2023

DELIVERED ON: 20 DECEMBER 2023

This judgment was handed down in open court and subsequently circulated electronically to the parties' representatives by email.

- [1] This appeal came before us with leave granted to the appellant by the Supreme Court of Appeal. On 11 September 2023 the appeal was heard by the full bench of this Division as constituted of myself, Thamae AJ and Vele AJ. Shortly after the hearing of the appeal was concluded but before judgment could be delivered, Thamae AJ sadly passed away.
- [2] The Superior Courts Act¹ makes provision for instances where a vacancy amongst the members of a court arises prior to the finalisation of a judgment.²
- [3] Vele AJ and I remained and constituted the majority of judges. We resolved to proceed considering the matter and to deliver this judgment.
- [4] The appellant was accused number three (3) in the Circuit Court of this Division held at Bethulie. It is convenient to refer to him as in the trial court.
- [5] Four accused were arraigned on three charges. The first charge was murder read with the provisions of section 51(1) of the Criminal Law Amendment Act (the “CLAA”)³. It was alleged that on 25 February 2019 at house number 1[...] in L[...] in Bethulie the accused unlawfully and intentionally killed T[...] M[...] M[...], an adult female (hereafter “the deceased”). The second charge was robbery with aggravating circumstances (read with the provisions of s51(1) of the CLAA) in that the accused by means of force and violence induced the deceased’s submission and stole her cell phone from her. Count 3 was that the accused at the same time and place in counts 1 and 2 unlawfully and intentionally deprived the deceased of her freedom of movement.

¹ Act 10 of 2013.

² S 14(5) provides:

“If, at any stage during the hearing of any matter by a full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, that hearing must—

(a) if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or

(b) ...if the remaining judges do not constitute such a majority, or if only one judge remains, be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the court.”

³ Act 105 of 1997.

- [6] At the conclusion of the trial accused 1, 2 and 3 were convicted of all three counts and accused 4 was acquitted. The appellant was sentenced on count 1 to life imprisonment, on count 2 fifteen years' imprisonment and on count 3 to five years' imprisonment. It was ordered that the sentences on counts 2 and 3 were to run concurrently with the sentence in count 1.
- [7] Leave as granted by the Supreme Court of Appeal to the appellant on 8 July 2022, was against both the convictions and sentences.
- [8] Accused 3 was legally represented during the trial and Mr Pieterse argued the matter before us on appeal. The state was represented by Mr Mpemvane who also appeared for the state in the hearing at the trial court.
- [9] The bones of contention and arguments in respect of the convictions may be summarised to say that it was submitted that the trial court misdirected itself in accepting the evidence of the state witnesses Messrs Zon and Dywili as credible and reliable. In respect of Mr Zon it was argued that he was previously a suspect and co-accused in the matter and it was contended that the trial court did not exercise proper caution in the evaluation of his evidence. It was submitted that both Mr Zon and Mr Dywili's evidence were inconsistent with their statements made to the South African Police Services. The critique levelled at the trial court included the submission that it had misdirected itself in drawing the conclusion that the three accused conspired to kill the deceased. The trial court was also criticized for rejecting the version tendered by accused 3. On appeal we were referred to the well-known dicta in ***R v Difford***⁴ and it was reiterated on this basis that the appellant was entitled to his acquittal if there was any reasonability of his explanation being true.
- [10] The highlights of the state case indicated that accused 3 and the deceased were in a toxic love relationship at the time of her death. One minor child was born from this union. According to the medico legal post mortem report the

⁴ 1937 (AD) 370 at 373.

deceased was strangled to death. Mr Dywili's evidence revealed that accused 3 approached him to assist in killing the deceased. A day prior to the deceased being killed, accused 3 transported accused 1 and 2 from Bloemfontein to Bethulie. Shortly before the death of the deceased, accused 3 was briefly at her place of residence and shortly after he had left, accused 1 and 2 entered the house. Testimony revealed that accused 1 and 2 contacted accused 3 shortly after deceased was killed – informing him that they were done. Accused 1, 2 and 3 re-united within a short time thereafter. Mr Zon then transported accused 1 and 2 and accused 3 followed them in his employer's vehicle. A cell phone was taken from deceased and later found when accused 1 and 2 were arrested. Accused 3 did not challenge accused 4's evidence that accused 1 and 2 did not have bags when traveling from Bloemfontein the night before the murder. This contradicts his evidence that accused 1 and 2 were delivering dagga that he bought from them. Surely if this was the case, they were to carry some luggage. It is highly improbable that accused 3 gave the child's cell phone for use in the dagga business as the unchallenged evidence of Ms M Mokatsi was that phone was on the table when accused 1 and 2 entered the house. Accused 3's version was not tested with the witness to get her comment thereon. The trial court extensively and with reference dealt with the differences between the witnesses Zon and Dywili's oral testimony and prior statements to the police.⁵ Having considered the merits and the demerits the trial court found that their oral evidence did not materially differ from their statements and accepted it. The trial court found both witnesses to be good witnesses and accepted their evidence.

- [11] From a perusal of the record and having heard arguments from counsel, I am unable to find that the trial court erred in rejecting accused 3's version as it did. The trial court found accused 3's evidence to be evasive and concluded that accused 3 deliberately tendered irrelevant answers to direct questions. There is no basis for interfering with the aforementioned findings by the trial court.

⁵ Compare: **S v Mafaladiso and Another** 2003 (1) SACR (3).

[12] I have not been convinced that the trial court misdirected itself in respect of any credibility findings nor that it misdirected itself in evaluating the evidence. In my view the factual findings made by the trial court are consistent with the evidence tendered before it. It is trite that in the absence of a demonstrable and or material misdirection by a trial court, its findings of fact are presumed to be correct and should be proven to be clearly wrong before a court of appeal will interfere.⁶ Despite the critique levelled against the trial court in various respects, Mr Pieterse responsibly did not insist that the trial court had not taken a holistic view of all the evidence tendered before him, considering each piece of evidence in favour and against both the appellant and the state in reaching the conclusion

[13] Although not listed as a ground of appeal, Mr Pieterse both in his heads of argument⁷ and in submission before us responsibly did not attempt to convince us that the appellant was not informed at the commencement of the trial of the minimum sentences applicable on counts 1 and 2 which would have caused appellant to conduct his defence differently. It is clear from the record that the trial court, before the appellant (and his co-accused) were requested to plead, not only explained the provisions of the CLAA, but also requested each accused whether they had been informed of the position by their respective legal representatives. Appellant so confirmed to the learned judge.⁸ Accordingly there is no merit in this point of appeal taken by the appellant. The appellant also bemoaned the fact that the indictment did not indicate that the accused had acted with a common purpose in the commission of the crimes. The record reflects that the indictment, together with the summary of substantial facts attached thereto, was read into the record. There is likewise no merit in this contention.

[14] It follows that the trial court's finding that the three accused plotted, planned and executed the murder does not stand to be interfered with by this court and that the appeal against the convictions stands to be dismissed.

⁶ *S v Hadebe and Others* 1979 (2) at 645.

⁷ Heads of Arguments p 4-5 paragraphs 14-17.

⁸ Record Vol 2 p101 at lines 9-22.

[15] In respect of sentencing, the appellant in his notice of leave to appeal relied on the grounds that the sentence was shockingly harsh and disproportionate.⁹ As counts 1 and 2 involved the consideration of whether substantial and compelling circumstances exist which would cause the trial court to deviate from the minimum mandatory sentences, the trial court duly considered and applied the tests enunciated in **S v Malgas**.¹⁰ The personal circumstances of appellant, the gravity of the offences of which he had been convicted and the interest of society were considered by the trial court. The court found that, although the appellant was a first offender, the heinousness of the murder by having the vulnerable 26-year old deceased strangled coupled with a complete lack of remorse, by far outweighed the factors in mitigation of sentence. In my view the trial court did not err in concluding that the aforementioned factors did not constitute substantial and compelling circumstances which would have caused him to deviate from the minimum sentences prescribed by the legislator in respect of counts 1 and 2.

[16] It follows thus that the appeal against the sentences imposed by the trial court, stands to suffer the same fate as the appeal against the conviction and stands to be dismissed.

[17] Accordingly the following order is made:

The appeal against the convictions and sentences is dismissed.

C REINDERS, J

I concur.

⁹ Record Vol 1 p96 paragraphs 2.1 and 2.2.

¹⁰ 2001 (1) SACR 469 (SCA).

VELE, AJ

On behalf of the Appellant:

Instructed by:

Adv KF Pieterse

Peyper & Botha Attorneys

BLOEMFONTEIN

On behalf of the Respondent:

Instructed by:

Adv LP Mpemvane

Director of Public Prosecutions

BLOEMFONTEIN