

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Case no: CA&R 125/2022

In the matter between:

MORNE VAN TONDER

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Govindjee J

[1] The appellant was convicted of murder (count 1), theft (count 2) and two counts of negligent driving (counts 3 and 4). He was sentenced by the Regional Court in Gqeberha to 20 years' imprisonment on count 1, five years' imprisonment on count 2, and six months' imprisonment each for counts 3 and 4. The sentences were not ordered to run concurrently, so that a sentence of 26 years' imprisonment was effectively imposed. On petition, the appellant obtained leave to appeal against his conviction and sentence. As to his conviction, the appellant argues that the magistrate erred in finding that the state had proved his guilt beyond reasonable doubt. The main basis for this argument is that the court a quo erred in accepting the evidence of the appellant's ex-wife, who was potentially biased against him, and because the court relied on the evidence of a single witness testifying about a matter

of identification, whose evidence should have been treated with caution. As there was nothing inherently improbable in the version of the appellant, it was argued that it was reasonably possible that he was not the person who murdered the deceased. Regarding sentence, it was submitted that the trial court failed to properly appreciate the time spent by the appellant in custody awaiting trial, and that his state of mind (he was under the influence of intoxicating liquor and drugs during the incident) should have counted as a mitigating factor. The court a quo ought not to have imposed a sentence five years in excess of the prescribed minimum sentence for count 1, and the cumulative effect of the sentences was unduly harsh. The sentence imposed was, it was argued, reflective of a material misdirection on the part of the magistrate.

[2] Much of the factual matrix of the case is not in dispute. The appellant and deceased knew each other. The deceased visited the appellant's home on the day in question. They subsequently spent time together at the deceased's flat, consuming drugs and alcohol. It is common cause that the appellant was at the home of the deceased on the night in question, returning to his home, where his ex-wife lived, sometime during the early hours of the following morning. He did so wearing a different top than he had worn when he had accompanied the deceased to his house to drink with him. Given the available DNA evidence, and the appellant's own testimony, it may be accepted that he had been wearing socks when he stepped in the blood of the deceased prior to leaving the deceased's home.

[3] Various witnesses were called to prove that it was the appellant who stabbed the deceased to death, and that he subsequently drove the deceased's car and was involved in an accident. The state relied, in particular, on the following two witnesses. Firstly, Mr Edward Vorster ('Vorster') identified the appellant running past him close to the scene of a motor vehicle accident in the vicinity of M[...] Street just after midnight. Secondly, the appellant's ex-wife, Ms van Tonder ('Van Tonder'), testified that the appellant had admitted to her that he had stabbed the deceased. The outcome of the post-mortem examination reflects that the deceased's injuries had mainly been caused by a knife. In addition to two bruises, there were 14 knife wounds and various injuries to the deceased's face. It must be accepted that the

murder weapon, containing the deceased's blood, was found on the scene. The appellant's DNA was found on the steering wheel of the deceased's vehicle.

[4] The appellant's version was that the deceased had made sexual advances towards him. He had lay down on the deceased's bed. Another man, now deceased, had arrived with two associates, one of whom had assaulted the deceased. He had left the deceased's home on foot and been robbed of the blue top he had been wearing, obtaining a red top en route to his home.

The judgment

[5] The court a quo was alive to the fact that there was no direct evidence that the appellant murdered the deceased, or that he had driven the vehicle of the deceased. The conviction was premised on the available circumstantial evidence, the court concluding that the only reasonable inference to drawn, to the exclusion of all other reasonable inferences, was that the appellant was guilty of murder, theft and two counts of negligent driving. The analysis proceeded as follows:

'The circumstantial evidence is that he was indeed there at the residence of the deceased. That he admitted to his ex-wife that he had stabbed the deceased and that he came from the direction of where the vehicle had been involved in an accident. The witness who saw him coming from the direction of the vehicle made a good impression on me. I am convinced that he was an honest and credible witness. The same may be said of his ex-wife. As I have already said she was very offended when it was put to her that he never told her that he had stabbed the deceased. I accept the evidence of these two witnesses. The accused's denial in this regard ... is thus rejected as false. I am satisfied that the State has proven beyond reasonable doubt that he caused the death of the deceased and that he then took his vehicle and raced away in it before getting into an accident with it ... I am however satisfied that he caused the death of the deceased and if one bears in mind the injuries inflicted as they appear from the post mortem report it is clear that he had direct intent to kill the deceased.'

The law

[6] Appeals on fact are disposed of in accordance with the principles set out in *R v Dhlumayo and Another*.¹ There is a presumption that the trial court's evaluation of the evidence is correct and it will only be disregarded if it is clearly wrong.² In the absence of any misdirection, the trial court's conclusion, including its acceptance of particular evidence, is presumed to be correct:

'In order to succeed on appeal [the appellant] must therefore convince us on adequate grounds that the trial Court was wrong in accepting [the] evidence – a reasonable doubt will not suffice to justify interference with its findings ... Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony.'³

[7] It is trite that conviction on the evidence of a single witness is possible, and that there is no rule of thumb test or formula to apply when it comes to consideration of the credibility of the single witness.⁴ Where the identity of the perpetrator of a crime depends on human observation and is in dispute, the court must exercise caution in carefully considering all the surrounding circumstances before deciding whether the state has proved beyond reasonable doubt that the accused is the perpetrator. Reliability of observation is also of fundamental importance. As the Court held in *S v Mthetwa*:⁵

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the

¹ *R v Dhlumayo and Another* [1948] 2 All SA 566 (A); 1948 (2) SA 677 (A).

² See *S v Francis* 1991 (1) SACR 198 (A).

³ *S v Francis* *ibid* at 204c-f.

⁴ *S v Sauls and Others* 1981 (3) SA 173 (A) at 179G-180G.

⁵ *S v Mthetwa* [1972] 3 All SA 568 (A); 1972 (3) SA 766 (A) at 768A-C.

mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities..."

[8] The best indication of whether appropriate caution was applied by the trial court to the evaluation of the evidence is to be found in its reasons for judgment.⁶ It is evident that the court a quo thought highly of the evidence of the single witness who identified the appellant shortly after the vehicle collision. The court failed, however, to engage with the reliability of that witness' observations given that the identification of the appellant close to the scene of the collision is in issue. There is no reflection in the judgment to suggest that the various considerations in respect of identification were properly appreciated and, ultimately, little explanation as to why Vorster's evidence regarding identification was reliable.⁷ That shortcoming amounts to a material misdirection of fact. The consequence is that this court is at liberty to disregard the presiding officer's findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the case, and to come to its own conclusion on the matter.

The evidence

[9] The evidence reflects that a person driving a white Kia, owned by the deceased, had been trying to exit the parking area of the block of flats where the deceased lived, colliding with other parked vehicles in the process. Approximately ten or fifteen minutes later, the Kia was observed approximately two kilometres from the block of flats. It had seemingly been involved in an accident and had overturned.

[10] Vorster testified that he knew the appellant because his ex-wife had previously pointed him out, while they had been driving, as the father of her child. On

⁶ *S v Ergie* 2021 (1) SACR 127 (WCC) para 6.

⁷ See *Schoonwinkel v Swart's Trustee* 1911 TPD 397 at 401.

the night in question, just after midnight, he had observed a vehicle travelling at high speed near the stadium, losing control as it came around a bend, overturning and crashing. The lighting at the scene of the collision was poor. A person was observed running towards him. Vorster recognised that it was the appellant, based on his facial features. Vorster spoke to him and asked him if he was alright or required any assistance. The appellant replied that he thought he was in trouble and continued running.

[11] During cross-examination, Vorster explained that he had seen the appellant on more than five occasions, but not for a few months prior to the incident. He had never spoken to him but had seen him at least twice when he stood on the pavement. He had not seen any person exiting the vehicle and the entire incident had occurred very quickly. The person he had seen had tattoos on his neck and a small goatee and the street lights made it possible for him to observe that it was the appellant. They had encountered one another under a light. On the appellant's version he did not encounter Vorster at all when he walked home from the deceased's flat.

[12] Van Tonder testified she had been married to the appellant for 14 years prior to their divorce. The appellant had woken her after midnight on the night of the incident. He was drunk and told her he had been robbed. He was now wearing a red top, having left her home wearing a dark navy top. The appellant indicated to her that he had returned to the deceased's flat after being robbed, and that the deceased had dropped him off.

[13] Van Tonder and the appellant had an altercation sometime during January 2019. He had been away for some time but had returned. The appellant then admitted that he had stabbed the deceased with a knife he had found in the kitchen. Van Tonder had conveyed the information to Warrant Officer Steyn.

[14] During cross-examination, the witness admitted to selling drugs at the time of the incident, also to the deceased. She had been arrested after the appellant, who also used drugs, had reported her to a detective. She had been in prison for two days. While she had been angry with him, she had allowed him to live with her as he

had no place to go. The deceased and the appellant had left her home together with a bag of drugs, driving in a white vehicle. The appellant was usually clean shaven, but sometimes sported a goatee. At the time of the incident the appellant had been clean shaven.

[15] Van Tonder appeared incredulous when confronted with the notion that she had lied in order to obtain revenge for her own imprisonment:

'Van Tonder: I was angry with him at that time.

Ms Baatjes: And you are still angry.

Van Tonder: I can't still hold that against him now but yes, at that time I was very, very angry with him.

Ms Baatjes: And he says that is why you went to speak to the police about this case.

Van Tonder: About this case?

Ms Baatjes: Yes.

Van Tonder: I felt that it was my right to tell them what he had told me about this.

Ms Baatjes: And to go and speak untruths to the police about him.

Van Tonder: Untruths?

Ms Baatjes: Yes.

Van Tonder: What untruths did I go and discuss with them?

Ms Baatjes: About these things that he allegedly told you.

Van Tonder: Just say that again?

Ms Baatjes: He says that you went and reported untruths to the police about things that you say he did such as that he was angry with the deceased because he allegedly said something bad about you.

Van Tonder: So you mean he wants to say that I made these things up because he had me locked up? I would never do such a thing...He is lying, he is a liar...He was still living with me, I was still accommodating him...that is the father of my child.'

Analysis

[16] On his own version it must be accepted that the appellant was on the scene at the time of the deceased's murder. It is not in dispute that he stepped in the blood of the deceased while exiting the flat. It is also apparent that the deceased's vehicle was driven after his death. The driver drove poorly, colliding with other vehicles in the parking area, cornering at high speed and causing the vehicle to roll. Vorster's evidence that he saw the appellant coming towards him, in a state of shock, soon thereafter, requires careful consideration and a measure of caution. While the lighting where the collision occurred was poor, Vorster was standing under a street lamp when he encountered the person he believed was the appellant. Given the collision that had occurred, and the pace with which he was approached, it is apparent that the scene was fast moving. But Vorster saw the person at close quarters and spoke to him with apparent concern. Importantly, it is plausible that he would have recalled the facial features of the appellant, including his tattoos, when his ex-wife pointed him out as the father of her child. Given the previous relationship between the appellant and his ex-wife, Vorster would have remembered what he looked like and testified that he had seen him on a few occasions. He recognised him that evening based on his facial features, in particular his tattoos and a goatee. The latter feature is questionable given Van Tonder's testimony that the appellant was usually clean shaven, and the appellant's own version in that respect, although it is apparent that the appellant sported a small goatee during his trial. Nevertheless, considering the various factors relating to the identification of the appellant near the scene of the collision, in the light of the totality of the evidence and the probabilities,

it was indeed the appellant that was the driver of the vehicle. This conclusion is supported by various factors, including his state of intoxication at the time, which is consistent with the poor driving observed by the witness at the block of flats and by Vorster. His DNA was also found on the steering wheel. On his own version he did not notice or hear anybody else driving the deceased's vehicle when he left the flat, having stepped in the deceased's blood. The overwhelming probabilities are that he drove the vehicle in leaving the scene of the crime.

[17] Van Tonder's evidence regarding the admissions made by the appellant was, in my view, correctly accepted by the magistrate, who was impressed by her testimony. The record reflects that her evidence was consistent and clear, and that she was an excellent witness. She had no difficulty in conceding her own involvement with drugs, explained her initial anger towards the appellant when he had reported her to the police, and the cogent reasons why she had allowed him to live with her thereafter. Her conduct in reporting what he had told her to the police was independently motivated, and not a fabrication borne out of revenge. The conversation between the appellant and Van Tonder confirms what is clear from analysis of the appellant's own version. He offered the most improbable of narratives as a counter to his own involvement in the deceased's death. The notion that he may have half slept through a vicious attack, involving multiple stab wounds and the deceased bleeding to death in the room where he lay, is far-fetched. Even accepting that he was under the influence of alcohol and drugs at the time, the conduct he described, on his own version, is implausible. To walk over the deceased's body, step in his blood, leave the scene without raising any alarm, return home and not mention a word of the stabbing of his long-time acquaintance to Van Tonder, beggars' belief. There are also the unexplained inconsistencies in his version regarding how he came to change his top during the course of events. This conclusion is consistent with the magistrate's assessment of Van Tonder's evidence, and the rejection of the appellant's version. That version was not reasonably possibly true. While the magistrate erred in failing to explain the reasons for the acceptance of Vorster's identification of the appellant, no mistake was made in convicting the appellant.

Sentence

[18] It is open to a court of appeal to interfere with a sentence that is excessive or disturbingly inappropriate. *Mrs Obermeyer* conceded, correctly, that this was the case given the circumstances of the matter.

[19] The presiding officer appeared to over-emphasise the appellant's prior convictions, the seriousness of the various offences and the evidence in aggravation, while underplaying the fact that he had been in custody awaiting trial since 2019, a period in excess of three years. No mention was made of the effect of alcohol and drugs on the sentence to be imposed. Improper consideration was also given to the cumulative effect of the sentences imposed. Considering all the circumstances, the difference between the sentence imposed and the sentence that this court would have imposed had it been sitting as the trial court. As such, the inference can be drawn that the trial court acted unreasonably, and therefore improperly. This warrants this court's alteration of sentence. Considering all the circumstances a sentence of fifteen years' imprisonment for the murder conviction would be appropriate, the sentences for the other convictions to run concurrently.

Order

[20] The following order will issue:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The sentence imposed is set aside and the following is substituted for it:

'Count 1: 15 years' imprisonment;

Count 2: 5 years' imprisonment;

Count 3: 6 months' imprisonment;

Count 4: 6 months' imprisonment

The sentences imposed on counts 2, 3 and 4 are to run concurrently with the sentence imposed on count 1.

The accused is deemed unfit to possess a firearm.'

4. In terms of s 282 of the Criminal Procedure Act, 1977 (Act 51 of 1977), the substituted sentence is antedated to 30 May 2022, being the date on which the appellant was sentence.

A GOVINDJEE
JUDGE OF THE HIGH COURT
G BLOEM:
I agree
G BLOEM
JUDGE OF THE HIGH COURT

Heard: 08 March 2023

Delivered: 14 March 2023

Appearances:

For the appellant: Adv Geldenhuys

Instructed by: Legal-Aid South Africa
69 High Street
Makhanda
6140
046 622 9350

For the respondent: Adv Obermeyer

Instructed by:

Director of Public Prosecutions

Makhanda

046 602 3000