

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: A188/2023

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
15/ 04/ 2024	

In the matters between: -

PHIWE MKWEBULA

APPLICANT

And

STATE

RESPONDENT

JUDGMENT

BAQWA, J (LE GRANGE AJ CONCURRING)

Introduction

- [1] The appellant was arraigned before the Regional Court, Fochville on a charge of murder (read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997) in that upon as about 16 June 2021 and at or near Wedela in The Regional Division of Gauteng he did unlawfully and intentionally kill Bavuyise Sobahle a male person by stabbing him with sharp object.
- [2] He was convicted as charged and sentenced on 2 June 2022 to fifteen years imprisonment and declared unfit to possess a firearm in terms of section 103 (1) of Act 60 of 2000.
- [3] The appellant was granted leave by the court a quo against sentence only.
- [4] The background to the case is summarised in the section 112(2) of the criminal Procedure Act statement tendered by the appellant before the court a quo.
- 4.1 In that statement the appellant admitted having unlawfully and intentionally killed Bavuyise Sobahle by stabbing him multiple times with a knife.
- 4.2 He further explained that on the morning of 16 June 2021 he was walking in Tugela Street on his way home from his brother's house when he noticed the deceased in front of him.

- 4.3 The deceased started shouting at the appellant as they had had an altercation a few days before. The deceased was armed with a knife.
- 4.4 The deceased proceeded to stab at the appellant with the knife. The appellant was able to grab hold of the knife and twisted his hand around with both holding the knife. He then stabbed the deceased on the chest.
- 4.5 The appellant disarmed the deceased of the knife and the deceased was no longer a threat to the appellant.
- 4.6 In his anger the deceased still tried to assault the appellant whereupon the appellant proceeded to stab the deceased multiple times. The deceased fell on the ground and the appellant left him, he was arrested by the police not far away from the scene.
- 4.7 The appellant admitted that he foresaw the possibility that by him stabbing the deceased in the manner that he did, that would cause the deceased serious injuries and that he might die.
- 4.8 He reconciled himself and accepted that possibility that the attack might result in his death.

Personal circumstance and background facts

[5] According to the pre-sentence report the appellant was a 25-year-old male. He

was unemployed and on the day of the incident he was at a stokvel where he consumed alcohol, thereafter the appellant was attacked by the deceased with a knife which left him with an injury on the hand. It needs to be noted however that some of these facts emanate from the section 112 statement and not from the pre-sentence report.

Plea and plea explanation

[6] It is correct that the State accepted the plea as tendered together with the plea-explanation and that that formed evidential basis on which the sentencing court imposed sentence.

[7] In doing so the court acted in accordance with the law as stated in *Director of Prosecution, Gauteng Division, Pretoria v Hammisi*¹ as follows;

“(8) it is clear therefore that a court considering a statement made in terms of a s. 112(2) exercises its discretion to determine whether the statement admits all the elements of the offence in question. If it is not satisfied that it is, it must question the accused as in set out in S. 112(1)(b) to clarify a matter raised in a written plea. If it determines that the statement is satisfactory and admits all the elements of the offence, it shall convict the accused on the plea of guilty. When the written plea

¹ 2018 (2) SACR 230 (SCA) par 8.

detailing the facts on which the plea is premised is accepted by the prosecution, **it constitutes the factual matrix on the strength of which an accused will be convicted and sentence imposed.**" (my emphasis)

[8] The court went on to emphasise the above in para 20 as follows

"(20) **The sentence imposed on the appellants should have been premised on the factual foundation as set out in the plea explanation,** the appellants did not plead as charged. Had they done so, the trial court would have been perfectly correct to rely on all the facts as set out in the charge sheet"

[9] The definitive paragraph in the judgment quoted above is the following;

"(30) It has been held that, where an accused pleads guilty and hands in a written statement in terms of S. 112(2) of the Criminal Procedure Act 51 of 1977, detailing the facts on which the plea is premised, and the prosecution accepts the plea, the plea so explained and accepted constitutes the essential factual matrix on the strength of which sentence should be considered and imposed – *S v Jemsen*². such an essential matrix cannot be extended or varied in a manner that

² Supra at 370g-371 G.

adversely impacts on the measure of punishment as regards the offender. The plea once accepted, defines the *lis* between the prosecution and the defence. Once the parameters of the playing fields are so demarcated, it becomes foul play to canvass the issues beyond. The rules of play have to be strictly enforced. In this instance it was not”

The Law

[10] It is trite that sentencing is a matter of discretion best left to the trial court.

Accordingly, and as a general principle the appeal court will only interfere if the discretion is not properly exercised. see *S v. Kgosimang*³

[11] The test is whether there is a basis for interfering with a sentence is whether it is vitiated by a misdirection or irregularities or whether is disturbingly inappropriate. see *S v Malgas*⁴ “[12]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 material mis-direction by the trial court vitiate its exercise of that discretion, an

³ 1992 (2) SA 238.

⁴ 200(1) SACR at para 12.

appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of 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 appellate court may be justified in interfering with the sentence imposed by the trial court. It may do so when 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 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 emphasised that in the latter situation the appellate court is not 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. No such limitation exists in the former situation.”

In the present matter

[12] The appellant submits, correctly so in my view, that the initial action of the appellant including the first stab wound suffered by the deceased complied with the principles of private defence and that the appellant acted in self-defence to repel the deceased’s potentially lethal attack on him.

[13] It is common cause, however, that according to the post mortem report the deceased suffered a total of six stab wounds. The subsequent five stab wounds as admitted by the appellant, were inflicted when the deceased was no longer a threat to him and his life was no longer in danger anymore. On the appellant's own admission, he was angered by the deceased's attack on him when proceeded to inflict the five stab wounds.

[14] From the accepted facts, so the appellant argues, there was no planning or premeditation on his side and that with this scenario there existed substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of fifteen years.

[15] In this matter, the issue of whether the court below exercised its discretion properly in the context of substantial and compelling circumstances has to be determined by outlining the approach adopted in dealing with provocation as a mitigating factor.

[16] The issue was dealt with in *S v Ndzima*⁵ where Plasket J. at paragraph 30 of his judgment said;

“[30] while it is a feature of provocation as mitigating factor that the criminal act that resulted from it is usually committed immediately after the

⁵ 2010 (2) SACR 501.

provocative act, the extent to which it is mitigatory depends essentially on whether the accused's loss of control as a result of his or her anger would be regarded by an ordinary reasonable person – 'n gewone redelike mens'- as an excusable human reaction in the circumstances. In this matter, a reasonable person would baulk at the suggestion that the appellant's acts of executing his incapacitated victims were understandable in the circumstances, even though he was justifying and understandably angry at having been assaulted and, no doubt, fearful when he fired the shots. That he was provoked and that the provocation was severe, is not in dispute that the anger evoked by the provocation led him to shoot the deceased who was running away is also understandable. But then to execute both of the deceased, when he ought to have been able to reflect on what he had done and to realise that he was no longer in any danger, cannot be regarded as an excusable human reaction to the provocation"

Fit of rage not mitigation

[17] To undergird the above, in *S v Mnisi*⁶ Boruchowitz AJA sitting with Cloete & Maya JJA held that

"[5] whether an accused acted with demissed responsibility must be

⁶ (2) SACR 227 at para 5 Boruchowitz AJA sitting with Cloete & Mai JJA.

determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His ipse dixit may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all circumstances and the alleged criminal conduct viewed objectively. The fact that an accused acted in a fit of rage or temper is in itself not mitigatory. Loss of temper is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others”

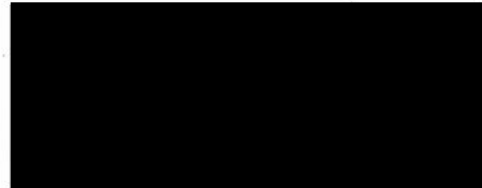
[18] The appellant had sufficient opportunity after disarming and stabbing the deceased once, to reflect on what he had done and to realise that he was longer in danger. To thereafter carry on and stab him again and again to the extent of five times cannot be “regarded as an excusable human reaction to the provocation” (para 30 *Ndzima*). The appellant clearly exceeded the bounds of self-defence and had at that time become the aggressor. In his plea explanation he admits awareness of the possible consequences of his act.

[19] Contrary to appellant’s submission regarding the presence of substantial and compelling circumstances the respondent submits that the numerous stab wounds constitute an aggravating factor. This accords with the finding of the court below which found no substantial and compelling circumstances.

[20] In light of the above, I propose that the following order be made:

Order

The appeal against sentence is dismissed.



S.A.M. BAQWA

JUDGE OF THE HIGH COURT

I agree



A.J. LE GRANGE

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 20 March 2024

Date of judgment April 2024

Appearance

On behalf of the Applicants

Adv F Van As

On behalf of the Respondents

Adv C Pruis

