



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION - PRETORIA**

Case No.: A18/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

03/02/21
DATE

SIGNATURE

In the matter between:

**BOY BOY JACOB SAOHATSE
SAMUEL TSHEOLO FAKU
OARABILE KENNY SAOHATSE**

1st Appellant
2nd Appellant
3rd Appellant

and

THE STATE

Respondent

JUDGMENT

MNGQIBISA-THUSI J:

- [1] On 5 November 2015 the appellants were convicted of murder, read with the provisions of s 51(1) and (2) of the Criminal Law Amendment Act¹ in the Sebokeng Regional Court. On 04 February 2016, the first and second appellants were sentenced to an effective period of 18 years imprisonment and the third appellant to 10 years imprisonment.
- [2] On petition to the Supreme Court of Appeal, the first and second appellants were granted leave to appeal against their conviction and the third appellant was granted leave to appeal against his conviction and sentence.
- [3] The conviction of the appellants relates to an incident which occurred on 22 January 2013 at Evaton, at the parental home of the first and third appellants, during which one Pule Lehoko ("the deceased") was killed after he was assaulted with various instruments.
- [4] The appellants are appealing against their conviction on the grounds that the court *a quo* erred in finding that the State had proven its case beyond a reasonable doubt based on the evidence of a single witness; and by not accepting the appellants' version as reasonably possibly true. With regard to sentence, it is the third appellant's contention that the court *a quo* erred in imposing the sentence of 10 years' imprisonment and not considering a non-custodial sentence, in that it failed to take into account the third appellant's age at the time of the commission of the offence. Further that the court *a quo* erred in over-emphasising the seriousness

¹ Act 105 of 1997.

of the offence, the interests of the community and the prevalence of the offence.

[5] The issue to be determined is whether the State has proven beyond a reasonable doubt that the appellants were the persons who assaulted the deceased, thereby causing his death.

[6] In brief the State's case is that on the day in question, the appellants, in furtherance of a common purpose, had assaulted the deceased at the home of the first and third appellants, which assault led to the death of the deceased.

[7] Mr Samuel Lehoko, whose evidence is as follows. On the relevant day he was sleeping at his house when at around 04h00, he heard some noise coming from outside. He woke up and jumped his parameter wall and went to where the noise was coming from, which was at the home of the first and third appellants. On arriving there he found people milling outside the first and third appellants' home and he went inside the yard where he found a neighbour, Mr Molefe Mahlatse ("Mr Mahlatse"), a witness for the defence, the three appellants and the deceased who was lying on the ground. His evidence is that he saw the appellants assaulting the deceased. The first appellant used a sjambok, the second appellant an iron rod and the third appellant a plank. He testified that as the deceased was being assaulted, the deceased never reacted but only showed some reaction when the second appellant hit him with the plank on his private parts. He testified that he then left and came back to the

first and third appellants' home in the morning where he found the police and discovered that the person who was assaulted by the appellants had died. He did not say anything to the police about the incident he had witnessed. However, when during the day he learnt that the person he witnessed being assaulted at the first and third appellants' home was actually his cousin, he went to the police where he gave a statement about what he had witnessed, leading to the appellants being arrested after he pointed them out. With regard to the visibility at the scene of the crime, Mr Lehoko testified that even though it was still dark, the area was illuminated by an Apollo light and lights coming from the Saohatse's house.

- [8] In the post-mortem report, it is indicated that the cause of death was 'multiple serious injuries'. Dr Schutte, the doctor who performed the post-mortem on the body of the deceased, testified that injuries sustained by the deceased before he succumbed to his wounds were consistent with being hit with a sjambok, an iron rod and a plank.
- [9] Former warrant officer Morena Dlamini testified that when he arrived in the morning at the crime scene, he found a piece of sjambok and an electrical pipe in the yard, lying to next to where the deceased was lying.
- [10] The appellants denied being responsible for the death of the deceased, maintaining either that they were not present when the deceased was assaulted or that they did not participate in the assault of the deceased.

[11] The first appellant testified that during the period when the deceased was assaulted, he was not at his parental home but was sleeping at his brother-in-law's house which is a few blocks from his home. At 04h00 his brother-in-law woke him up and he returned to his parental home where he found his mother, the third appellant and the deceased lying on the ground. Thereafter Mr Molefe Mahlatse ("Mr Mahlatse"), a neighbour, arrived at his home. Although he inquired about what had happened, her mother did not tell him how it came about that the deceased was lying on the ground in her yard. His mother only told him about the presence of an intruder in the yard. Only later did his mother tell him that whilst they were asleep, an intruder came into the yard, and when the third appellant went outside to investigate, he collided with the deceased and a struggle ensued. A group of community members started assaulting the deceased. He denied participating in the assault on the appellant. With regard to visibility on the day in question, first appellant testified that although it was still dark, there was a street light which was on. He denied seeing either the second appellant or Mr Lehoko at his parental home.

[12] The second appellant's testimony is that on the day in question, between 03h00 and 04h00 and while sleeping he was woken by a noise and he heard people talking in his neighbour's yard (the Saohatse's). He went to the neighbour's house and found people standing inside and outside the yard of the Saohatse house. He did not see either the first appellant, the third appellant or the first appellant's mother. He testified that there was chaos in the yard and he later left to go to work. He further testified

that he was unable to see inside the yard because there was a wall. He also denied being involved in the assault of the deceased.

[13] The third appellant testified that on the day in question he was woken up by his mother to investigate the presence of an intruder in the yard. When he went outside, he bumped into the intruder and a strife ensued between them and he fell on a rock. He testified that he went to sit on a *stoep* and there was chaos in the yard as members of the community, who had jumped over the wall as the gate was locked, responded to his mother's screams. He could not see what they were doing. He testified that he could not remember whether Mr Mahlatse was there or whether there were any weapons. He further testified that he did not see second appellant on the day in question.

[14] The first and third appellants called Mr Mahlatse who testified as follows. On the day in question between 04h00 and 05h00, his father woke him up as he heard a noise coming from their neighbour's house. He went to the first and third appellants' parental home where he found their parents and all three appellants and the deceased injured and lying on the ground inside the yard. There were community members standing outside the yard. At some stage he saw the first appellant pulling the deceased back into the yard as he tried to run away and tied his feet. He testified that the second appellant had asked the first appellant to call the police. At a later stage Mr Lehoko also came into the yard. He denied seeing any weapons. He further denied witnessing any assault on the deceased.

[15] The evidence pertaining to the killing of the deceased and identity of the perpetrator thereof was given by Mr Lehoko, a single witness.

[16] In convicting the appellants, the court a quo said the following²:

“ The accounts given by Lehoko were credible and reliable in all material respects and satisfactory beyond a reasonable doubt. The killing of the deceased was a slow grinding process. There were breaks when these people will take a break and rest and go back, continued unabatedly with the attack.

The killing of the deceased in the manner described by Lehoko constituted murder. The post-mortem report shows multiple injuries and these are the cause of death. The state witnesses were honest and reliable. There is no reasonable possibility that the defences raised by the accused persons could be true. Their defences are not reasonably, possibly true. I reject their versions as false beyond a reasonable doubt”.

[17] In criminal cases, the State bears the onus to prove the guilt of the accused person(s) beyond a reasonable doubt. The onus of proof is discharged if the evidence presented by the state establishes the guilt of the accused beyond reasonable doubt. The corollary is that the accused is entitled to be acquitted if it is reasonably possible that he might be innocent. There is no obligation upon the accused to convince the court of his innocence.

[18] In *S v Van der Meyden*³ the court stated the following:

² Page 217 lines 7 – 17 of the paginated record.

³ 1999 (2) SA 79 (W) at 81I-82E.

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of the test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored"⁴.

[19] On behalf of the appellants it was submitted that the court *a quo* erred in its finding that Mr Lehoko was a credible witness. Further that no explanation is given as to why the evidence of the single state witness was accepted and that of an Independent witness, Mr Mahlatse was rejected.

[20] A court of appeal will not ordinarily depart from a trial court's findings of fact unless such findings unless they are plainly wrong. In *R v Dhlumayo and Another*⁵, the court stated that the trial court's findings of fact and credibility are presumed to be correct because the trial court has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.

⁴ See also *S v Chabalala* 2003 (1) SACR 134 (SCA) where the court held that: "[15] ...the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt".

⁵ 1948 (2) SA 677(A) at 705. See also *S vs Francis* 1991 (1) SACR 198 (A) at 204 c-f.

[21] It is common cause that the appellant and his co-accused were convicted on the basis of a single witness.

[22] It is trite that a court can base its finding on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect or if there is corroboration⁶. Section 208 of the Criminal Procedure Act ("the Act") provides that an accused person may be convicted on the single evidence of a competent witness. In *S v Sauls and Others*⁷ the court held that:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber*. . .). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense".

⁶ See *Mahlangu v S* 2011 (2) SACR 164 (SCA) at para [21].

⁷ 1981 (3) SA 172 (A) at 180E-G.

[23] With regard to the consideration in a criminal trial of the evidence of a single the Supreme Court of Appeal in *Y v S*⁸ stated that:

"[45] In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. Furthermore, the accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the accused's explanation is false beyond a reasonable doubt. (See: *S v* 2000 (1) SACR 453 (SCA) at 455B.) The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is trite that in an appeal the accused's conviction can only be sustained after consideration of all the evidence and the accused's version of events.

...

[48] The applicant was convicted on the evidence of a single witness, which in order to be sufficient to convict, must be clear and satisfactory in every material respect. (See: *S v Sauls* 1981 4 All SA 182 (A).) It is trite that a court will not rely on such evidence where the witness has made a previous inconsistent statement, where the witness has not had a sufficient opportunity for observation and where there are material contradictions in the evidence of the witness. In *Sauls* it was held that there is no rule of thumb, test or formula to apply when it comes to the consideration of the credibility of a single witness. Rather, a court should consider the merits and demerits of the evidence, then decide whether it is satisfied that the truth has been told despite the shortcomings in the evidence".

⁸ (537/2018) [2020] ZASCA 42 (21 April 2020).

[24] From reading the record it is clear that the court *a quo* was alive to the fact that it was dealing with the evidence of a single witness with regard to the events surrounding the killing of the deceased. From the court *a quo*'s reasons, it does not appear that the court *a quo*'s evaluation of the evidence can be criticised in any material respect. The trial court found that Mr Lehoko was a credible and left a good impression. Further, the evidence of Mr Lehoko as to how the deceased was assaulted is - corroborated by the post-mortem report and the evidence of Dr Schutte with regard to the nature of the wounds the deceased sustained. This is further corroborated by the evidence of Warrant Officer Dlamini about finding a piece of a sjambok and an electrical pipe next to the deceased's body. Mr Lehoko further testified about the visibility of the area where the assault took place and was able to identify the appellants as they were known to him as neighbours. Even though the first and second appellants tried to distance themselves from the assault, Mr Mahlatse testified that he found them on the premises when he went to investigate the noise. Mr Lehoko did not contradict himself.

[25] I am satisfied that the court *a quo* did not misdirect itself in finding that the State had proven the guilt of the appellants beyond a reasonable doubt. I am therefore of the view that the appellants' appeal on conviction ought to be dismissed.

SENTENCE

[26] The imposition of sentence falls within the discretion of the trial court and an appeal court may only interfere with a sentence if it is satisfied that the trial court discretion in sentencing was not judicially and properly exercised⁹.

[27] A sentence imposed by a lower court will only be altered if:

27.1 an irregularity took place during the trial or sentencing stage;

27.2 the court *a quo* misdirected itself in respect of the imposition of sentence;

27.3 the sentence imposed by the court *a quo* could be described as disturbingly or shockingly inappropriate. See *S v Salzwedel and others* 1999 (2) SACR 586 (SCA) at 591 [10] and *S v Malgas* 2001 (1) SACR 469 (SCA) at 857 D-E.

[28] The issue which this court has to determine is whether the trial court has misdirected itself in imposing an effective sentence of 10 years' imprisonment on the third appellant, taking into account the fact that at the time of the commission of the offence he was 16 years old.

[29] In *S v Rabie* 1975 (4) SA 855 (a) at 861A-862F the court stated that punishment must fit the criminal, as well as the crime, taking into account the interest of society, as well as the need to blend the sentence with a measure of mercy.

⁹ *S v Pieters* 1987 (3) SA 717 (A) at 727 F – 728 C.

[30] In respect of the trial's court's discretion in imposing an appropriate sentence, the court in *S v Kgosimore*¹⁰ the court stated that:

"[10] It is trite that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate, or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulation, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. ... Either the discretion was properly and reasonably exercised or if it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.

[31] The offence for which the third appellant was convicted falls within the purview of the minimum sentence regime which prescribes a minimum sentence of life imprisonment where a murder was committed with a common purpose, unless substantial and compelling circumstances exist warranting a departure from the prescribed minimum sentence. However, the provisions of s 51 (1) and (2) do not apply to an accused who was below the age of 18 years at the time of the commission of the offence.

¹⁰ 1999 (2) SA SACR 238 (SCA).

[32] There is no dispute that the crimes the appellant and the others committed are serious.

[33] According to the triad formulated by the Appellate Division in *S v Zinn* 1969 (2) SA 537 (A), the personal circumstances of the criminal, the seriousness of the offence and the interests of the community are the relevant factors determinative of an appropriate sentence.

[34] In sentencing the third appellant the court *a quo* took into account his age at the time of the commission of the offence and the fact that he was a first offender as mitigating factors. However, the court *a quo* appears to have given the following aggravating factors more weight than the existing mitigating factors:

34.1 the fact that the deceased was mercilessly and brutally assaulted by the third appellants;

34.2 the prevalence of the offence;

34.3 the seriousness of the offence.

[35] On behalf of the third appellant it was argued that the sentence imposed was harsh in view of the age of the third appellant at the time of the commission of the offence. It was further submitted that the court *a quo* misdirected itself by over-emphasising the interest of the community, the seriousness of the offence and its prevalence.

[36] While conceding the youthfulness of the third appellant at the time of the commission of the offence, it was submitted on behalf of the respondent

that the third appellant has not shown any remorse and that the interest of the community call for a harsh sentence.

[37] At the time of the commission of the offence, the third appellant was 16 years old, single and still a learner and is a first offender. Although the trial court took into account the fact that the third appellant showed no remorse, I am of the view that the trial court failed in this regard by overemphasizing the interests of the community and the seriousness of the offence at the expense of the appellant's personal circumstances.

[38] Although the nature and seriousness of the offence the third appellant was convicted of warranted a custodial sentence, I am not convinced, bearing in mind the age of the third appellant, that it was appropriate under the circumstances. I am of the view, as correctly pointed out by counsel for the appellants, that the court a quo over-emphasised the seriousness of the offence and the interests of the community over the personal circumstances of the third appellant. Taking into account that the third appellant was still a juvenile at the time of the commission of the offence. Bearing in mind that the third appellant's co-accused were adults, there is a possibility that he participated in the assault on the deceased out of pressure. Furthermore, I am convinced that the third appellant was a good candidate for rehabilitation, taking into consideration his age and the fact that he was still at school. The court a quo's reasons for preferring to impose a custodial sentence instead of

correctional supervision¹¹ as suggested by the probation officer are not convincing.

[39] In the result I am satisfied that the third appellant's appeal against sentence ought to be upheld and the following order is made:

1. The appellants' appeal against conviction is dismissed.
2. The sentence of the court *a quo* is set aside and is replaced with the following:

'The third accused is sentenced to correctional supervision in terms of s276 (1) (h)'.



NP MNGQIBISA-THUSI

Judge of the High Court

I agree:

¹¹ Section 276(1)(h) of the Act provides that: "The following sentences may be passed upon a person convicted of an offence, namely- (h) correctional supervision."



B MNYOVU

Acting Judge of the High Court

Appearances

For the Appellants: Mr. Khumalo (instructed by: Khumalo Attorneys)

For the Respondent: Adv Germishuis (instructed by the DPP, Pretoria)