



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

Case No: AR227/2020

In the matter between:

MBONGISENI MKHIZE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Delivered on 12 February 2021

Mossop AJ (Seegobin J concurring):

[1] The appellant and a co-accused were charged with the offence of murder in that it was alleged that they unlawfully and intentionally killed one Malibongwe Mkhize, a male person. In seeking their conviction, the State gave notice that the provisions of section 51(1) of the Criminal Procedure Act 51 of 1977 (henceforth '*the Act*') was of application in that the accused allegedly acted together in common purpose.

[2] After a trial in the Greytown Regional Court, both the appellant and his co-accused were convicted of the offence of murder. The appellant was sentenced to life imprisonment and his co-accused was sentenced to 5 years imprisonment in terms of the provisions of section 276(1)(i) of the Act.

[2] This appeal is before us by virtue of the appellant's statutory right to an appeal in terms of the provisions of section 309 of the Act. There is no appeal from the appellant's co-accused.

[3] The events that transpired in this matter occurred in the general area of Msinga, within the province of KwaZulu-Natal. This is notoriously an area that has in the past been plagued by so-called '*faction fights*'. Reference to such past faction fights in the general area was repeatedly made during the course of the evidence that was led in the court *a quo* although there was nothing arising out of that evidence to indicate that the events with which we are concerned were anything to do with a faction fight.

[4] On 18 March 2018, two groups of young men came together at a shop known as Malembe shop, in the Mathengwenya area at Umhlangani. A group of young males were inside the shop when they were approached by a young man from the Mathengwenya area who indicated that other young men from his area required the group of young men in the shop to come out and to fight them. The group exited the shop to find out what was going on. It transpired that the young men from the Mathengwenya area wanted one of their number, named Lungisani, to fight with a young man, known as Lungani, who formed part of the group who were in the shop.

[5] The two opposing groups of young men then stood and observed the commencement of the fight between Lungisani and Lungani. As the fight progressed, it became apparent that Lungisani was going to be defeated by Lungani. Lungisani began crying out for help as his physical defeat loomed. Initially, he received no assistance. Suddenly, however, the appellant's co-accused grabbed the deceased, who was not a participant in the ongoing fight but merely a spectator, from behind and pinned the deceased's arms to his side. The appellant then stabbed the deceased in the chest whilst the deceased was powerless to defend himself. A post-mortem later revealed that the stab wound penetrated the left ventricle of the deceased's heart and caused his demise.

[6] All the witnesses to testify for the State at the trial identified the appellant and his co-accused as the two individuals who were responsible for the death of the deceased. Specifically, the appellant was identified as the person who performed the stabbing and his co-accused was identified as the person who held the deceased to allow the stabbing to occur. The Learned Regional Magistrate considered the evidence of the State witnesses and, in my view, correctly found them to be reliable and consistent in their evidence. Moreover, they were certain in their identification of the appellant as the deceased's assailant.

[7] The appellant and his co-accused were not nearly as impressive in their testimony as the State witnesses were. Indeed, the appellant presented two versions to the court regarding the events in question. In the first version, he denied doing the stabbing. It was thus put to the first state witness, Mzwandile Mkhize, by the appellant's legal representative that:

'Other than the accused I will deny the fact that at any stage he did stab the deceased.'

[8] Again, when the third State witness, Sipho Sithole, testified, the following was put to him by the appellant's legal representative:

'Accused 1 will deny that he, at any stage, stabbed the deceased?'

[9] This first version differed markedly from the second version advanced by the appellant and which was offered up when he testified in chief. When he did so, he admitted that he had stabbed the deceased. In response to clarifying questions put by the court, the following was stated:

‘COURT: Are you now saying that you did stab the deceased? --- Yes, he got stabbed.

Did you stab the deceased? --- Yes.

[10] The effect of this admission was to eradicate any doubt that may have existed as to who the person was that plunged the knife into the chest of the deceased. As a consequence, the evidence of the witnesses who were adamant that the appellant was the stabber, but who were told that the appellant would deny that he was that person, was rendered reliable.

[11] It follows that there can be no doubt that the appellant was the person who caused the death of the deceased. What was his explanation for doing this? He made reference to an alleged argument between the deceased, one Thabiso and himself. This argument apparently devolved into a physical confrontation and, ultimately, the stabbing of the deceased. But the fact of this separate conflict was never put to any of the witnesses

who testified for the State, it being revealed only in the appellant's evidence-in-chief. According to the appellant, the deceased was allegedly armed with a knife that he let slip and it fell to the ground and which was retrieved by the appellant. He then used that knife to stab the deceased. His sole explanation for stabbing the deceased was that '*I was emotional*'. There was no suggestion that the appellant acted in self defence.

[12] The Learned Regional Magistrate in the court *a quo* was, in my opinion, correct in convicting the appellant of murder.

[13] The question of sentence must be considered. The offence was without doubt one of the utmost gravity. A young human life was lost through the conduct of the appellant and his co-accused. No sentence that can be imposed upon the appellant can reverse the consequences of his and his co-accused's actions.

[14] There are, however, a number of factors that redound to the benefit of the appellant:

- (a) he was a young man, aged 19, who until the time of the murder was still a scholar;
- (b) he had no previous convictions;
- (c) contrary to what the State submitted in its heads of argument, the appellant did display some remorse for his conduct. He sought forgiveness for his actions in his evidence-in-chief. I temper my comments in this

regard by acknowledging that this happened only after the State had led its evidence that unquestionably identified the appellant's involvement in the murder. The appellant may well have seen the writing on the wall and may have been trying to create a better impression of himself;

- (d) the events that unfolded do not seem to have been planned or orchestrated, other than the fight between Lungiseni and Lungani. Emotions clearly ran high as the appellant's combatant appeared to face defeat. Indeed, the appellant's excessively emotional state was his only explanation for why he did what he did.

[15] It is so that a court of appeal will only interfere with the sentence of a lower court if the sentence imposed is shockingly inappropriate or the court has misdirected itself. It must be borne in mind, even when it is the prescribed punishment, that a sentence of life imprisonment is the most extreme sentencing option available under our law. As the Supreme Court of Appeal has stated:

*'Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound'*¹

¹S v Vilakazi 2009 (1) SACR 552 (SCA) at para 21.

[16] In my view, it is important when considering the appropriateness of the sentence imposed upon the appellant not to start with the mindset that the sentence that he received is *a priori* a just sentence. All the circumstances of the case must be identified, considered and evaluated and then it should be considered whether the sentence is disproportionate to the crime, the offence and the legitimate needs of the community. That will require the court to consider what a just sentence would be in all the circumstances of the case. If a just sentence falls materially below the prescribed sentence there will be substantial and compelling circumstances to depart from the prescribed sentence.²

[17] After considering all the circumstances of the matter, in my view the Learned Regional Magistrate failed to attach sufficient weight to the age of the appellant and the fact that the murder was not evilly plotted in advance but happened spontaneously in response to unplanned and developing circumstances. In my view therefore the sentence imposed is not a just sentence in the circumstances of the matter. This court is therefore at liberty to intervene.

[18] It is beyond question that the appellant must be harshly punished for his conduct, but in my view, he need not be broken to the extent that a second life is wasted arising out of these unfortunate circumstances. Fyodor Dostoyevsky once said that to live without hope is to cease to live. The appellant should be left with some vestige of hope for his future. In my view, this may best be achieved by varying the sentence of the appellant. In my view, a sentence of 15 years imprisonment would meet the needs of the matter.

² S v GK 2013 (2) SACR 505 (WCC) at para 14.

Order

[19] I accordingly propose that:

- (a) the appeal on conviction be refused; and
- (b) the appeal against sentence be allowed and that the sentence be altered to one of imprisonment for 15 years.

MOSSOP AJ

I agree:

SEEGOBIN J

APPEARANCES

Date of Hearing	:	12 February 2021
Date of Judgment	:	12 February 2021
Counsel for Plaintiff	:	
Instructed by	:	
Counsel for Defendant	:	
Instructed by	:	